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# Inherently Unneutral Investment Treaty Arbitration: The Formation of Decisive Arguments in Jurisdictional Determinations

Relja Radović\*

## ABSTRACT:

*The legitimacy crisis of investment treaty arbitration is much discussed, often challenging the neutrality of that system as a whole. Besides concentrating on the direction in which cases are being decided, or in which the law is being interpreted, the neutrality of investment treaty arbitration as a system can also be discussed from the perspective of its foundations. This article looks at the arbitral use of the two basic ideals of investment treaty arbitration, namely the legalistic and teleological notions, in the formation of decisive arguments, in the particular context of jurisdictional decisions. It examines to what extent the two basic ideals in investment treaty arbitration are used in the formation of decisive arguments justifying pro-investor or pro-State interpretive outcomes in resolving jurisdictional issues. It is argued that the foundations of investment treaty arbitration induce arbitrators to opt for one of the two points of view in their work. Faced with an interpretive issue, they can observe it either in light of the fact that the rules, as they are, must have been consented to by the States parties to the investment treaty, or in light of the purpose of such rules to protect foreign investors. This shows that favouring one side over the other when facing difficult jurisdictional issues is not simply dependant on the arbitrators' personal attitudes. Their approaches might as well reflect the foundations of investment treaty arbitration, while legalistic and teleological decisive arguments seem to form never-ending excuses for favouring one party over the other.*

## I. INTRODUCTION

Certainly one of the most persistent controversies in investment treaty arbitration is the crisis of its legitimacy.<sup>1</sup> Besides identifying the most striking issues in

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1. See generally Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005); and THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY (Michael Waibel et al. eds., 2010) [hereinafter THE BACKLASH]. See also Gus Van Harten et al., *Public Statement on the International Investment Regime*, OSGOODE HALL LAW SCHOOL (Aug. 31, 2010), <http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/>. For a recent challenge of the investment arbitration system as a whole, see Martti Koskeniemi, *It's not the Cases, It's*

the arbitral practice and its structure,<sup>2</sup> discussion of the legitimacy of investment treaty arbitration includes some practical reactionary problems,<sup>3</sup> as well as suggestions on how the imperfections of the mechanism should be fixed.<sup>4</sup> Although often addressing some structural problems, the legitimacy concerns usually observe investment treaty arbitration through the lenses of result, concentrating on the direction in which cases are being decided,<sup>5</sup> or in which the law is being interpreted and developed.<sup>6</sup>

The neutrality of investment treaty arbitration as a system, the core of the discussions on its legitimacy, can also be discussed from the perspective of its foun-

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*the System*, 18 J. WORLD INV. & TRADE 343 (2017) (reviewing M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2015)).

2. Besides inconsistencies in arbitral rulings, other issues troubling investment treaty arbitration have also been identified, such as the lack of transparency and the inability to meet the needs of the public, the apprehension of bias in favour of foreign investors, as well as the dominance of a closed circle of actors. See, for example, Organisation for Economic Co-Operation and Development, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, OECD WORKING PAPERS ON INT'L INVESTMENT 2005/01 (2005), [http://www.oecd.org/daf/inv/investment-policy/WP-2005\\_1.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf); Gus Van Harten, *Perceived Bias in Investment Treaty Arbitration*, in THE BACKLASH, *supra* note 1, at 433; Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387 (2014); and Joost Pauwelyn, *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus*, 109 AM. J. INT'L L. 761 (2015).

3. As a result of dissatisfaction with arbitral practice, some States started denouncing the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and their bilateral investment treaties [hereinafter BIT]. Thus, Bolivia and Ecuador withdrew from the ICSID Convention, while the latter also terminated some of its BITs. See United Nations Conference Trade and Development [hereinafter UNCTAD], *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims* (2010), [http://unctad.org/en/Docs/webdiaeia20106\\_en.pdf](http://unctad.org/en/Docs/webdiaeia20106_en.pdf); Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, 237 N. Y. L. J. (June 26, 2007); and Christoph Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, in THE BACKLASH, *supra* note 1, at 353. For other examples of terminating or letting BITs lapse, see Engela C. Schlemmer, *An Overview of South Africa's Bilateral Investment Treaties and Investment Policy*, 31 ICSID REV.—FOREIGN INV. L. J. 167 (2016); Alvin Yeo & Smitha Menon, *Indonesia – Arbitrating with Foreign Parties: A Closer Look at Indonesia's Approach to Investor-State Dispute Settlement*, 18 ASIAN DISP. REV. 124 (2016); and Nish Shetty & Romesh Weeramantry, *India's New Approach to Investment Treaties*, 18 ASIAN DISP. REV. 189 (2016).

4. The idea of an Investment Court was introduced in an effort to remedy the challenges of the non-transparency, inconsistency, and closed circle of (biased) arbitrators, as suggested by the European Union in 2015 during its negotiations of new free trade regimes. See European Commission, *Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations* (Sept. 16, 2015), [http://europa.eu/rapid/press-release\\_IP-15-5651\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5651_en.htm). Furthermore, an empirical research has shown that arbitrators have indeed reacted (to a certain extent) to States' dissatisfaction with the investment arbitration system, producing more diverse outcomes. See Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?*, EUR. J. INT'L L. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2835488](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2835488).

5. See Susan D. Franck, *International Investment Arbitration: Winning, Losing and Why*, 7 COLUM. FDI PERSPECTIVES 3 (2009); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N. CAR. L. REV. 1 (2007); Kathleen S. McArthur & Pablo A. Ormachea, *International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction*, 28 REV. LITIG. 559 (2009). Recent statistics show that more cases have been decided in favour of States, than in favour of investors (however, excluding cases which ended up settled). See UNCTAD, *Investment Dispute Settlement Navigator*, <http://investmentpolicyhub.unctad.org/ISDS> (last visited Dec. 17, 2016).

6. For example, discussions concerning the application of most-favoured-nation [hereinafter MFN] clauses to dispute settlement clauses, the introduction of mass claims, or the protection of indirect investment. See generally M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (2015).

dations. So far such an approach has been taken in labelling investment treaty arbitration as a one-sided system.<sup>7</sup> That portrayal, however, does not exhaust possible interplays between theory and practice in that dispute resolution system. This article aspires to go further. It makes the hypothesis that the entire system of investment treaty arbitration is stretched between two basic ideals: (i) consent of the States parties to an investment treaty (*legalistic* notion), on the one hand, and (ii) protection of foreign investment (*teleological* notion), on the other.<sup>8</sup> It is suggested that arbitrators often choose one of these two ideals as the basis of their interpretations of the law. This is where the trouble begins, since giving preference to one of the two notions usually means neglecting the other, prospectively rendering the arbitrator biased in favour of either the State or the investor.

To test the above-mentioned suggestion, this article looks at the use of the legalistic and teleological notions in the formation of decisive arguments in arbitral interpretations of the law. It does so in the particular context of jurisdictional decisions, where such decisive arguments lead to clear outcomes—to take or not to take the case. This article asks to what extent the two basic ideals in investment treaty arbitration are used as bases of decisive arguments in arbitral reasoning, aimed at justifying pro-investor or pro-State approaches in resolving jurisdictional issues. It is argued that the foundations of investment treaty arbitration induce arbitrators to opt either for the legalistic or for the teleological point of view in their work. Faced with an interpretive issue, arbitrators can observe it, and thereafter draw conclusions, either in the light of the fact that the rules, as they are, must have been consented to by the States parties to the investment treaty, or in the light of the purpose of such rules to protect foreign investors. This might lead to sharpening the existing treaty rules, or conversely, to their loosening. The unneutrality at the foundations of the system does not allow decisive arguments to be built in any other way than appearing pro-investor or pro-State in interpretive outcomes. More importantly, such a use of the two ideals shows that their harmony, which is often argued in both scholarship and practice,<sup>9</sup> is rather illusory.<sup>10</sup>

As for the desired outcomes, this article does not seek to explain the operation of the interpretative tools of the Vienna Convention on the Law of Treaties [hereinafter VCLT].<sup>11</sup> Instead, it discusses the formation of decisive arguments in the

7. See Koskenniemi, *supra* note 1; See also Mehmet Toral & Thomas Schultz, *The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations*, in THE BACKLASH, *supra* note 1, at 577.

8. The terms “legalistic” and “teleological” are used for descriptive purposes only, dubbing the two ideals discussed in Part II, Section A.

9. See *infra* notes 11, 218-219.

10. The potential conflict between the intention of the States parties to a treaty and its object and purpose as seen by an adjudicator is also noted in general international law. See H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y. B. INT’L L. 48, 69-70 (1949).

11. Indeed, the rules of this convention instruct that any treaty should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Vienna Convention of the Law of Treaties, art. 31, ¶ 1, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Thus, there should be compliance of the treaty text (its “ordinary meaning”) and the object and purpose of the treaty. See MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 435-6 (2009). Furthermore, investment tribunals often point out that interpretation of dispute resolution clauses should be neither restrictive nor expansive, but “balanced.” See, among many others, *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 34 (May 24, 1999) [hereinafter *CSOB*]; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No.

resolution of jurisdictional issues.<sup>12</sup> Furthermore, this is a qualitative, rather than a quantitative study. It examines how arguments are being formed and used in practice, and it does not measure the presence of certain types of arguments.<sup>13</sup> However, hopefully, the results of this research can shed a different light on the legitimacy debate. It can show that favouring one side over the other when facing difficult jurisdictional issues, and hence in investment cases, is not simply dependent on the arbitrators' personal attitudes. Their approaches might as well reflect the foundations of investment treaty arbitration, while the uses of the legalistic and teleological decisive arguments seem to form never-ending excuses for favouring one party over the other in interpretative outcomes. This argument, however, should not be taken for an expression of scepticism towards investment treaty arbitration as a system—it rather aims at explaining the realities, which might frustrate the calls for perfection.

Part II of this article discusses the theoretical basis of the legalistic/teleological dichotomy. It explains why both ideals are at the foundations of investment treaty arbitration, and why this sphere of international dispute resolution presents a particularly fertile field for their use in the formation of decisive arguments. Part III analyses the actual use of the legalistic and teleological decisive arguments in practice, in the particular context of jurisdictional decisions. Where appropriate, special attention is given to the comparison between decisions and dissenting opinions, and their diverging use of the two notions. Part IV discusses how the two ideals are employed in the formation of decisive arguments, leading to pro-State or pro-investor interpretive outcomes.

## II. INHERENT UNNEUTRALITY OF INVESTMENT TREATY ARBITRATION

The theoretical foundations of investment treaty arbitration form the root of the rivalry between the legalistic and teleological ideals.<sup>14</sup> To demonstrate this, this Part discusses the dichotomy itself (Section A), and then proceeds to the issue of its operation in a “hybrid” dispute resolution mechanism (Section B). It is argued that because this dichotomy is embedded at the foundations of investment treaty arbitration, the use of the two ideals in the formation of decisive arguments appears quite attractive.

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ARB/03/15, Decision on Jurisdiction, ¶¶ 68-70 (Apr. 27, 2006); *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 43 (Oct. 11, 2002); *Austrian Airlines v. The Slovak Republic*, UNCITRAL *ad hoc* arbitration, Final Award, ¶ 121 (Oct. 9, 2009); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, ¶ 867 (Dec. 7, 2011).

12. This approach seems constructive, given that treaty interpretation using the rules of the VCLT is often criticised as a very weak point in the practice of investment tribunals. See *infra* notes 77-78 and accompanying text.

13. For an empirical analysis of the use of interpretive arguments by ICSID tribunals, see Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301 (2008).

14. A similar rivalry—between the States' policy choices of submitting certain disputes to investor-State arbitration, on the one hand, and securing investors an access to justice, on the other—was argued to cause the need for balancing in the context of jurisdictional proof. See Frédéric G. Sourgens, *By Equal Contest of Arms: Jurisdictional Proof in Investor-State Arbitrations*, 38 N. C. J. INT'L L. & COM. REG. 875, 912-18 (2013). For a practical perspective on that rivalry, see also Eduardo Savarese, *Investment Treaties and the Investor's Right to Arbitration between Broadening and Limiting ICSID Jurisdiction*, 7 J. WORLD INV. & TRADE 407 (2006).

### A. Legalistic and Teleological Ideals at the Foundations of International Investment Law and Arbitration

Probably the best-known feature of international adjudication in general is its consensualism.<sup>15</sup> From the “old times” of inter-State arbitrations and the Permanent Court of International Justice [hereinafter PCIJ],<sup>16</sup> until today,<sup>17</sup> the adjudicatory power of international courts and tribunals finds its source in consent of the disputing parties. This eternal characteristic of international adjudication required adjustment of all the new fields of international adjudication that appeared over time.<sup>18</sup> Very often, this adjustment seemed to form a struggle between an old, archaic system of international law, on the one hand, and the innovative objectives the new regimes were meant to achieve, on the other.

#### i. Legalistic Ideal: Investment Treaty Arbitration as Part of Public International Law Adjudication

The famous *Lotus* case of the PCIJ is usually consulted in every discussion on the foundations of the international legal order, which is, according to that Court, based on States’ “own free will.”<sup>19</sup> What is now known as the “*Lotus* principle”

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15. See Edvard Hambro, *The Jurisdiction of the International Court of Justice*, 76 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 125, 129-41 (1950) (discussing international arbitration throughout history, and observing that it has proved impossible to reach an agreement on a system of compulsory arbitration; particularly noting the failure of the idea of obligatory jurisdiction in the twentieth century when the statutes of the two World Courts were drafted). See also Edward McWhinney, *Judicial Settlement of Disputes. Jurisdiction and Justiciability*, 221 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 9, 24-29 (1990); and, for investment arbitration in particular, ANDREA MARCO STEINGRUBER, *CONSENT IN INTERNATIONAL ARBITRATION* 71 (2012).

16. Status of Eastern Carelia, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 5, at 27 (July 23) (“It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.”). For inter-State arbitrations, see J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 83-106 (5th ed. 2011); see also Christine Gray & Benedict Kingsbury, *Developments in Dispute Settlement: Inter-State Arbitration Since 1945*, 63 BRIT. Y.B. INT’L L. 97 (1992).

17. Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, 1999 I.C.J. Rep. 124, ¶ 20 (June 2) (“... whereas the Court [International Court of Justice, hereinafter ICJ] can therefore exercise jurisdiction only between States parties to a dispute who not only have access to the Court but also have accepted the jurisdiction of the Court, either in general form or for the individual dispute concerned;”).

18. While in the past inter-State adjudication dominated the field of international dispute settlement, today various other fields of international law allow settlement of disputes between States, on the one hand, and private persons, on the other. Most prominent examples are those of human rights (in many forms, levels and regions) and investor-State dispute settlement mechanisms. The proliferation of international courts and tribunals has resulted in the establishment of many specialised adjudicatory bodies. See generally Gary Born, *A New Generation of International Adjudication*, 61 DUKE L. J. 775 (2012) (arguing that a new generation of international adjudication can be identified, consisted of tribunals which practically exercise compulsory jurisdiction). Further on the proliferation of international courts and tribunals and the fragmentation of international law, see CHESTER BROWN, *A COMMON LAW OF INTERNATIONAL ADJUDICATION* 15-34 (2007).

19. The Case of the S.S. “*Lotus*” (France v. Turkey), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) (“International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.” [emphasis added]).

instructs that States have obligations under international law only upon their consent.<sup>20</sup> Most importantly, this equally applies both to substantive obligations of States, and their acceptance of international dispute resolution regimes.<sup>21</sup>

The *Lotus* principle remains applicable even today, in the context of international investment law, in two respects. First, international investment law is in its essence (if not entirely) treaty law. It is based on a network of some 3000 bilateral and multilateral treaties.<sup>22</sup> Some standards of investment protection can be found in customary international law,<sup>23</sup> and it has also been argued that such an expansive and detailed network of (bilateral) investment treaties results in the multilateralization of international investment law.<sup>24</sup> Nevertheless, the basic architecture of international investment law, providing substantive investment protection as well as procedural mechanisms for their enforcement, remains treaty-based, thus directly dependant on States' "own free will."<sup>25</sup>

Second, the newly developed mechanism of investment treaty arbitration had to adjust to the consensual nature of international dispute resolution. As this article analyses the use of legalistic and teleological decisive arguments in the context of jurisdictional decisions, this second aspect of the *Lotus* principle is more important. While some fields of international law saw the creation of specialised courts, and thus used the technique of general, standing consent of States to their jurisdiction,<sup>26</sup> the field of investment dispute resolution kept the requirement that consent needs to be given with regard to each dispute submitted for adjudication.<sup>27</sup> Certainly,

20. See James Crawford, *Sovereignty as a Legal Value*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 117, 122-23 (James Crawford & Martti Koskenniemi eds., 2012) (comparing the approaches taken by the PCIJ in the *SS Wimbledon* and *SS Lotus* cases, and arguing that in the former the PCIJ was stricter, as it held that in case of doubt a restrictive treaty interpretation should prevail).

21. Crawford distinguishes the benefit of the *Lotus* principle from the requirement of consent to international dispute settlement, but acknowledging the relation of both to "the principle of sovereignty." *Id.* at 124-25.

22. An up-to-date database of international investment agreements is provided by UNCTAD, International Investment Agreements Navigator, <http://investmentpolicyhub.unctad.org/IIA> (last visited Dec. 18, 2016). For a general analysis of BIT theory and practice, see KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, INTERPRETATION* (2010).

23. See generally PATRICK DUMBERRY, *THE FORMATION AND IDENTIFICATION OF RULES OF CUSTOMARY INTERNATIONAL LAW IN INTERNATIONAL INVESTMENT LAW* (2016); and Tarcisio Gazzini, *The Role of Customary International Law in the Field of Foreign Investment*, 8 J. WORLD INV. & TRADE 691 (2007). It is worth noting that even if international investment law would rely more heavily on customary law, according to *Lotus*, its norms would still derive from States' "own free will."

24. See generally STEPHAN W. SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* (2009).

25. ANDREW NEWCOMBE AND LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 1 ff. (2009).

26. For example, Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14, art. 19, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR] ("To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights . . . . It shall function on a permanent basis.") and art. 34 (defining the right to file application).

27. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 25, ¶ 1, March 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention] ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally."). See also International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ¶ 23 (March 18, 1965), 1 ICSID REPORTS 23 (1993) ("Consent of the parties is the cornerstone of the jurisdiction of the Centre.").

some adjustments had to be made, prompted by the needs of the modern dynamics, as it was done by the theory of consent by an offer and acceptance.<sup>28</sup> Nevertheless, these adjustments only reinforced the idea that no international adjudication can take place without consent.<sup>29</sup>

Although investment treaty arbitration is often characterised as “hybrid” due to its use of private dispute resolution mechanisms,<sup>30</sup> even the elements of such a system safeguard this basic setting of international adjudication. Thus, should arbitrators render an award that exceeds the scope of the given consent to arbitrate, they will be risking the authority of their award.<sup>31</sup> The exceptional treatment of the question of consent guarantees that arbitrators will not act outside the limits of the parties’ authorisation.<sup>32</sup> A natural step for a respondent party is to first object to the jurisdiction of the tribunal,<sup>33</sup> while arbitrators must decline to hear the case should they see that the conditions of jurisdiction are not met.<sup>34</sup>

This categorical connotation of the questions of consent does not mean that there have never been attempts to challenge it. Speaking about international law in

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28. On consent by offer and acceptance, see *Millicom International Operations B.V. & Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on Jurisdiction of the Arbitral Tribunal, ¶ 63 (July 16, 2010) [hereinafter *Millicom*]; see also RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 254-60 (2nd ed. 2012); and Christoph Schreuer, *Consent to Arbitration*, in *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW* 830 (Peter Muchlinski et al. eds., 2008). Such an innovative approach to the consensualism of investment arbitration led to the famous characterisation of that system as “arbitration without privity.” See Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV.—FOREIGN INV. L. J. 232 (1995).

29. As illustrated by denunciations of the ICSID Convention and review of the existing BITs by some States; see *supra* note 3.

30. See *infra* Part II, Section B.

31. ICSID Convention, *supra* note 27, art. 52, ¶ 1 (“Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: . . . (b) that the Tribunal has manifestly exceeded its powers; . . .”); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, ¶ 1, June 10, 1958, 330 U.N.T.S. 38 [hereinafter *New York Convention*] (“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: . . . (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced”).

32. See W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L. J. 739, 745-47 (1989); see also *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *Ad Hoc* Committee on the Application for Annulment, ¶ 118 (Jan. 24, 2014) (“The only recourse against the award available to the parties is limited to what is set out in Article 52 of the ICSID Convention. No appeal is allowed by said Article, which indicates clearly that an Annulment Committee should not review the merits. . . . Given this framework, this Committee concludes that in balancing these principles and interests, annulment is an exceptional recourse that should respect the finality of the award. Thus, the grounds for annulment should be interpreted as being exhaustive and restrictive. This conclusion is consistent with those of various committees which have asserted repeatedly that the role of an Annulment Committee is restricted to assessing the legitimacy of the award, to examining the integrity of the proceedings, and not to correct the award.” [internal reference omitted]).

33. Indeed, respondent States are (to a certain extent) pressed to object to the jurisdiction of the tribunal without delay, and to do so relatively persuasively. See Christoph Schreuer, *Belated Jurisdictional Objections in ICSID Arbitration*, 7(1) T.D.M. (2010); and Joost Pauwelyn, *Defenses and the Burden of Proof in International Law*, in *EXCEPTIONS IN INTERNATIONAL LAW* (L. Bartels & F. Paddeu eds., forthcoming 2017) (manuscript at 9-12), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2863962](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2863962).

34. See *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, ¶¶ 148-51 (Aug. 2, 2006).



general, it has been suggested that there is a shift towards more informal international law, as opposed to the formal one based on consent of States.<sup>35</sup> On the other hand, as for investment arbitration in particular, it has been suggested that widespread inclusion of dispute settlement clauses in investment treaties can even lead to the formation of an offer to arbitrate as a customary rule of international law.<sup>36</sup> However, none of these propositions actually challenge the requirement of consent as such, but rather its centrality and firmness in today's international legal order.<sup>37</sup> Another issue consists of the attempts to establish somewhat weaker and alternative standards for the establishment of consent in investment treaty arbitration, as a fragmented field of international dispute settlement.<sup>38</sup> But even such developments do not disturb the consensual basis of investment arbitration; rather, consensualism stubbornly persists.

As it can be seen, despite all the innovation in the field of investment treaty arbitration, its consensual basis survives, and it can hardly be changed. Still, arguments are made that such a setting is somehow unfair to the well-being of the international community, which requires international regulation.<sup>39</sup> The centrality of the protected objects (such as foreign investment) in new protective treaty regimes, together with the perception of such regimes as global public goods with global benefits, plays a crucial role in that respect.

## ii. Teleological Ideal: Protection of Foreign Investment and International Investment Law as a Global Public Good

Modern international investment law and arbitration emerged in the second half of the twentieth century.<sup>40</sup> In that evolutionary process, States have taken steps to

35. See generally Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1 (2014); Armin Steinbach, *The Trend towards Non-Consensualism in Public International Law: A (Behavioural) Law and Economics Perspective*, 27 EUR. J. INT'L L. 643 (2016). For the argument that the international community should move more towards non-consensualism, see Andrew T. Guzman, *Against Consent*, 52 VIRGINIA J. INT'L L. 747 (2012).

36. Mathias Audit & Mathias Forteau, *Investment Arbitration without BIT: Toward a Foreign Investment Customary Based Arbitration?*, 29 J. INT'L ARB. 581, 581 (2012).

37. The first approach does not reveal contestation of the consensualism of international law as such, but it looks beyond the "traditional" into a new, informal international law. The other approach seeks to satisfy the requirement of consent through customary international law, therefore staying in the sphere of States' "own free will".

38. For example, scholars have criticised the establishment of jurisdiction relying on MFN clauses. See Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 J. INT'L DISP. SETTLEMENT 97 (2011).

39. For the identification of "the consent problem," as arising in the distribution of benefits between States and the rest of the international community, and for the suggestion that consequently "requiring consent from all decision-making states frustrates many potential arrangements that would improve the lot of states as a whole", see Guzman, *supra* note 35, at 756-61.

40. See Joost Pauwelyn, *Rational Design or Accidental Evolution? The Emergence of International Investment Law*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 11, 15 (Zachary Douglas et al. eds., 2014) (arguing that international investment law "was not rationally designed or entered into at one given point . . . but slowly emerged over time from a series of small, historically-contingent and often accidental steps;" although Pauwelyn recognises the contribution of centuries-long developments, it seems that the crucial ones are still recent: "IIL emerged through evolution, rather than revolution, partly designed by states (as in ICSID or BITs), partly constructed by arbitrators (as in the 1990 game-changing *AAPL v Sri Lanka* case . . .), partly moulded by litigators, academics and commentators (who since the late 1990s have started to talk of international or foreign investment law as a separate field), and heavily influenced by historical events and happenstance . . .")

develop both substantive norms of investment protection,<sup>41</sup> and procedural mechanisms for their enforcement.<sup>42</sup> It is often said that these developments formed part of the post-World War II efforts to advance investment flows and economic development around the world.<sup>43</sup>

These developments can also be viewed in the context of the post-World War II expansion of protective treaty regimes, which largely changed the role played by treaties in international law.<sup>44</sup> A clear example are human rights treaties.<sup>45</sup> What is more, respect for human rights law was soon recognised as a “global public good.”<sup>46</sup> The crucial criteria in such qualifications are those of universality and accessibility to all.<sup>47</sup> And indeed, public goods in general are characterised by their

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[internal references omitted]). For these centuries-old developments, and for the argument that the origins of international investment law are found in the historical expansion of European trade and investment, which is still reflected in its modern form, see generally KATE MILES, *THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL* (2013).

41. On the post-World War II developments and the emergence of BITs, see Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, 12 U.C. DAVIS J. INT’L L. & POL. 157, 161 (2005); see also Pauwelyn, *supra* note 40, at 25-26.

42. For the establishment of ICSID and its contribution to the formation of modern international investment law, see *id.* at 27-29. However, Pauwelyn notes that only second-generation BITs started the massive trend of consenting to ICSID arbitration. *Id.* at 29-31.

43. See Sir Elihu Lauterpacht, *Foreword*, and *Authors’ Preface to the Second Edition* to THE ICSID CONVENTION: A COMMENTARY, ix-xii (Christoph H. Schreuer et al. eds., 2nd ed. 2009); see also *Preamble*, in THE ICSID CONVENTION, at 1, 4-5. Interestingly, international investment law and development are today often seen as opposed concepts, despite aiming to promote one another. See Stephan W. Schill, Christian J. Tams & Rainer Hofmann, *International Investment Law and Development: Friends or Foes?*, in INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT: BRIDGING THE GAP 3 (Stephan W. Schill et al. eds., 2015).

44. On the development of so-called “rights agreements” in the examples of international humanitarian law and human rights law, see Lea Brilmayer, *From “Contract” to “Pledge”: The Structure of International Human Rights Agreements*, 77 BRIT. Y.B. INT’L L. 163, 168-172 (2007).

45. *Austria v. Italy*, App. No. 788/60, 1961 Y.B. Eur. Conv. on H.R. 116, decision, at 18-9 (Eur. Comm’n on H.R.) (noting that “the purpose of the High Contracting parties in concluding the [ECHR] was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law,” and that “it follows that the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves”). For a comparison between human rights and investor-State dispute settlement regimes, see José Enrique Alvarez, *The Public International Law Regime Governing International Investment*, 344 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 193, 234-46 (2009).

46. Inge Kaul & Ronald U. Mendoza, *Advancing the Concept of Public Goods*, in PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION 78, 95-99 (Inge Kaul et al. eds., 2003). On the innovative side of that approach (by detaching the notion of public goods from the sphere of economics), see Malcolm Langford, *Keeping Up with the Fashion: Human Rights and Global Public Goods*, 16 INT’L J. MINORITY AND GROUP RTS. 165, 166, 168 (2009) (reviewing TOWARDS NEW GLOBAL STRATEGIES: PUBLIC GOODS AND HUMAN RIGHTS (Erik André Andersen & Birgit Lindsnaes eds., 2007)). See also Birgit Lindsnaes, *The Global and the Regional Outlook: How Can Global Public Goods Be Advanced from a Human Rights Perspective?*, in TOWARDS NEW GLOBAL STRATEGIES: PUBLIC GOODS AND HUMAN RIGHTS 71, 73 (Erik André Andersen & Birgit Lindsnaes eds., 2007).

47. Kaul and Mendoza define global public goods as “goods whose benefits extend to all countries, people, and generations,” or—less strictly—as goods which benefit “more than one group of countries and does not discriminate against any population group or generation.” Kaul & Mendoza, *supra* note 46, at 95.

non-rivalry and non-excludability,<sup>48</sup> while the concept of “global public goods” pertains to the benefit certain goods bring to the international community.<sup>49</sup> What stems from this idea is the need for international regulation: “[j]ust as the state is needed to provide public goods at optimal levels nationally, international governance is needed to provide the optimal level of global public goods.”<sup>50</sup> In the context of human rights, this served to further advance the idea that international regulation of human rights can contribute to the global well-being.<sup>51</sup> Therefore, it might be the case that at some point such protective treaty regimes became mere vehicles for the provision of certain goods, which are now considered “global public.”

The question that follows is whether all the protective treaty regimes existing today aim to secure certain global public goods.<sup>52</sup> While this question probably cannot be answered in such an abstract manner, it can be noticed that in both spheres of international trade<sup>53</sup> and investment law<sup>54</sup> there have been suggestions that they indeed constitute (global) public goods. As for the latter, it has been suggested that international investment law satisfies the two basic characteristics of a public good, namely (i) non-rivalry, since its use by one party (an investor or a State) does not disturb its usage by the others, and (ii) non-excludability, as it ultimately provides the benefits of facilitating capital flow and advancing economic growth to all, both members and non-members of the system, including future generations (although its main architecture might resemble a “club good,” being available only to signatories of investment treaties).<sup>55</sup> Accordingly, the system of international investment

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48. For the main characteristics of public goods and a brief history of their development, see Daniel Bodansky, *What's in a Concept? Global Public Goods, International Law, and Legitimacy*, 23 EUR. J. INT'L L. 651, 652-54 (2012) (“First, there is no rivalry between potential users of the good: one person can use it without diminishing its availability to others. Secondly, people cannot practically be excluded from using the good. Thus it is available to everyone, whether they contributed to producing it or not.” However, Bodansky also notes that “[t]he concept of public goods is an ideal type,” that “[f]ew, if any, goods are fully non-rivalrous and non-excludable,” and that “[g]oods that do not fully meet the tests of non-rivalry and non-excludability are usually termed ‘impure’ public goods.”). See also Langford, *supra* note 46, at 169 (discussing other restrictions, such as exclusivity and competitiveness of some public goods).

49. Bodansky, *supra* note 48, at 653.

50. *Id.* at 655 (internal references omitted). It should be noted that Bodansky discusses possible legitimating effect of global public goods to international organisations.

51. Cf. Daniel Augenstein, *To Whom It May Concern: International Human Rights Law and Global Public Goods*, 23 INDIANA J. GLOBAL LEG. STUD. 225 (2016); and Neil Walker, *Human Rights and Global Public Goods: The Sound of One Hand Clapping?*, 23 INDIANA J. GLOBAL LEG. STUD. 249 (2016) (criticising the scheme of global public goods and human rights, and its (in)ability to address properly the matters of global concern).

52. See, in regard to “objective regimes,” Michael Waibel, *The Principle of Privity*, University of Cambridge Fac. of L. Res. Paper No. 44/2016, 11 (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2839839](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2839839) (noting that they “typically provide and protect global or regional public goods”). For the definition and history of “status treaties” or “objective regimes,” see CHRISTIAN J. TAMS, *ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW* 80-83 (2005).

53. See generally Petros C. Mavroidis, *Free Lunches? WTO as Public Good, and the WTO's View of Public Goods*, 23 EUR. J. INT'L L. 731 (2012).

54. See generally Barnali Choudhury, *International Investment Law as a Global Public Good*, 17 LEWIS & CLARK L. REV. 481 (2013). For the argument that the jurisprudence of investment arbitral tribunals constitutes a public good, see Stephan W. Schill, *The Jurisprudence of Investment Treaty Tribunals: Between Public Good and Common Concern*, in *FOREIGN INVESTMENT, INTERNATIONAL LAW AND COMMON CONCERNS* 9 (Tullio Treves et al. eds., 2014).

55. Choudhury, *supra* note 54, at 502-04.

law benefits to the global well-being.<sup>56</sup> A clear consequence of such a view would be that international investment law is not seen as a mere *voluntary arrangement* between two (or more) States signatories of an investment treaty, but rather as a public good which *requires* to be secured by virtue of international regulation.

Although these propositions can be debated endlessly, few less ambitious observations can be made here. First, foreign investment is a universally recognised object of protection under international law.<sup>57</sup> Second, with the aim of protecting foreign investment, a network of bilateral and multilateral investment treaties has been established.<sup>58</sup> Third, and final, such treaties with the protective purpose might be viewed as creating “pledges,” and thus seen quite differently from the traditional model of treaty-contracts.<sup>59</sup> In such regimes, the interests of the protected object might take priority over the States’ interest as the contracting parties,<sup>60</sup> while if they are also seen as benefiting global well-being, investment treaties can be viewed as vehicles for satisfying the needs of the international community.

Practical consequences stemming from such theoretical foundations of protective treaty regimes are that contracting States no longer have absolute control over their treaties. States are no more the main interpreters and appliers of their treaties. This is particularly true for the protective treaty regimes that provide for dispute resolution mechanisms.<sup>61</sup> Furthermore, the suggested shift towards informal (as opposed to the formal or traditional) international law, results precisely from the dissatisfaction with the capacity of the consent-based international legal system to secure those goods that can be characterised as “global public.”<sup>62</sup> Nevertheless, as international dispute resolution is still unthinkable without consent,<sup>63</sup> the introduction of that discourse might produce different effects: if international investment law, as a regime providing protection to investors around the globe, is indeed seen as a global public good, the perception of the firmness of consent to arbitrate in the

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56. However, Choudhury notes that international investment law fails to actually bring such benefits, due to the legitimacy concerns and the failure of arbitral practice to recognise the role of foreign investment in the development of States. *Id.* at 505-13.

57. For a historical perspective, see SURYA P. SUBEDI, *INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE* 7-18 (2nd ed. 2012); and, for the post-colonial period in particular, see M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 21-28 (3rd ed. 2010).

58. See DOLZER & SCHREUER, *supra* note 28, at 6-11; and particularly for the NAFTA and the Energy Charter Treaty, *id.* at 15-17.

59. Brilmayer, *supra* note 44, at 170 (arguing, in respect of rights agreements, that “[r]eciprocity is not the glue that holds a rights regime together; the glue that holds a rights regime together is shared commitment to moral principle”). As for the disappearance of privity in international investment law between the State and the investor, but its persistence in other respects, see Waibel, *Privity*, *supra* note 52, at 20 ff.; see also Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARVARD INT’L L. J. 353, 402 (2015).

60. Particularly if the investment law regime is regarded through the dispute resolution lenses, where only the host State and the foreign investor appear as disputing parties. See Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT’L L. 179, 184 (2010); and Alex Mills, *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, 14 J. INT’L ECON. L. 469, 490 (2011).

61. Roberts, *supra* note 60, at 179 (the opening words argue: “A key problem in the investment treaty field is that the balance of power between treaty parties and tribunals concerning the authority to interpret investment treaties is askew. In theory, treaty parties are supreme when creating the law and tribunals are supreme when applying it in particular cases. In practice, this separation is never complete.”).

62. See generally Krisch, *supra* note 35, and particularly at 4-6.

63. See *supra* Part II, Section A, Subsection 1.

field of investment disputes might erode in favour of a better (or wider) investor protection.<sup>64</sup>

Therefore, international investment law, as a network of thousands of protective treaty regimes, engaged with new streams of thinking about international law, with prospectively radical implications. Its purpose to protect foreign investors, and its possible status as a global public good, induce the relevant actors to shift focus from the traditional consensualism-based thinking on the international legal order, towards seeking to satisfy that purpose.

### *B. The Contribution of the “Hybrid” System of Investment Treaty Arbitration*

Besides its protective purpose, international investment law was innovative regarding its dispute settlement mechanisms. Despite being developed for the settlement of disputes arising under public international law, international investment law borrowed certain mechanisms made for the settlement of private disputes.<sup>65</sup> This characteristic led to the famous qualification of international investment arbitration as a “hybrid” system.<sup>66</sup> This has few implications on the substantive aspects of arbitrators’ work.

First, being an *ad hoc* system, investment arbitration does not allow taking general standings on interpretative issues arising in practice. Inconsistent arbitral practice is one of the main criticisms addressed in the debate on the legitimacy of investment arbitration.<sup>67</sup> In comparison, human rights again provide well-known institutionalised examples of taking a stand on how certain interpretive issues should be handled, as it has been done by the European Court of Human Rights.<sup>68</sup> As an *ad hoc* system, investment arbitration is not able to take such a uniform position on

64. See YUVAL SHANY, QUESTIONS OF JURISDICTION AND ADMISSIBILITY BEFORE INTERNATIONAL COURTS 43 (2016) (suggesting that some courts, which serve specialised regimes like human rights treaties, might give priority to their task to promote human rights norms over the principle of consent and its strict application); Martti Koskeniemi & Päivi Leino, *Fragmentation of International Law? Post-modern Anxieties*, 15 LEIDEN J. INT’L L. 553, 561-2 (2002) (discussing deviations from standard interpretations for the purpose of upholding specialised jurisdiction and promoting the objectives of a particular regime).

65. Such as the International Chamber of Commerce and Stockholm Chamber of Commerce arbitration auspices, and UNCITRAL arbitration rules. Investment disputes are also often brought under the auspices of the Permanent Court of Arbitration in The Hague. The ICSID mechanism, however, was developed particularly for the settlement of investment disputes in a “denationalised” environment.

66. Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 BRIT. Y.B. INT’L L. 151 (2003).

67. See generally Franck, *supra* note 1. Cf. Thomas Schultz, *Against Consistency in Investment Arbitration*, in THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW, *supra* note 40, at 297 ff. (challenging the unconditional pursuance of the ideal of consistency in the name of the rule of law; assuming that some rules within the investment law system are simply bad, their inconsistent application would do less harm).

68. For example, the effects of the “living instrument” doctrine and the particular object and purpose of the ECHR on its interpretation. See *Tyrer v. The United Kingdom*, App. No. 5856/72, 26 Eur. Ct. H.R. 16, ¶ 31 (1978) (“... the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.”); *Loizidou v. Turkey*, App. No. 15318/89, [1995] Eur. Ct. H.R. 10, ¶ 72 (1995) (“... the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective ...”).

certain interpretive issues. This was one of the reasons for the introduction of the idea of an investment court system, with an appellate mechanism which would secure uniform approaches to interpretive issues.<sup>69</sup> Nevertheless, the current existing mechanism of investment treaty arbitration is not equipped for meeting such an expectation.

This problem goes even deeper. While the lack of institutional instruments does not allow adoption of general positions on interpretive issues, the *ad hoc* nature of investment arbitration causes the conflict between many tribunals in terms of their understandings of certain concepts. For example, the International Court of Justice has been (secretly) strict when interpreting jurisdictional rules, and it has taken such an approach largely due to its continuous understanding that the concept of consent to its jurisdiction is strongly associated to State sovereignty.<sup>70</sup> Investment tribunals, on the other hand, are capable of taking completely opposite approaches. While some tribunals see a broader picture behind the concept of consent,<sup>71</sup> others regard it merely as a trigger to arbitration.<sup>72</sup> Therefore, it is not only positioning on the interpretations of the law that causes inconsistencies, but also broader understanding of the governing legal concepts.

The second implication of this “hybrid” system is the detachment from general international law thinking. It has been argued that in such an arbitral environment, adjudicators actually have more law-making opportunities.<sup>73</sup> *Prima facie*, this

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69. For the idea of an appellate mechanism and its critique, see DOLZER & SCHREUER, *supra* note 28, at 35. For the introduction of an Investment Court, see *supra* note 4.

70. In line with the *Lotus* principle that obligations of States (including subjecting to international adjudication) stem exclusively “from their own free will,” see *East Timor (Portugal v. Australia)*, Judgment, 1995 I.C.J. Rep. 90, ¶ 34 (June 30) (where the Court distinguished between mere legal interests of third States, and the subject matter of the case, arguing that the principle that the Court “can only exercise jurisdiction over a State with its consent” prevents deciding on the lawfulness of the acts of a third State and its rights and obligations). However, it was also held that international law does not recognise the rule that jurisdictional clauses should be interpreted restrictively or liberally. See *Oil Platforms (Iran v. U.S.)*, Preliminary Objection, 1996 I.C.J. Rep. 803, 847, ¶ 35 (Dec. 12) (separate opinion by Higgins, J.).

71. See *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, ¶ 168 (Aug. 22, 2012) [hereinafter *Daimler* (Award)] (“Stepping back from the specific case of bilateral treaties, all international treaties – whether bilateral, plurilateral or multilateral – are essentially expressions of the contracting states’ consent to be bound by particular legal norms. They encapsulate voluntarily accepted restraints upon the universally recognized principle of state sovereignty.”); see also *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, ¶ 55 (Oct. 12, 2005) [hereinafter *Noble Ventures*] (in relation to an umbrella clause, the Tribunal noted the separation of State’s obligations under international and domestic law, and then relied on the ICJ practice when concluding that “an important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so” [internal reference omitted]).

72. See *Methanex Corporation v. The United States of America*, UNCITRAL *ad hoc* arbitration, Partial Award, ¶ 105 (Aug. 7, 2002) (where the Tribunal rejected the Respondent’s argument that jurisdictional clauses should be interpreted restrictively in respect of State sovereignty, and simply noted that the Claimant’s submissions should be supported—who argued for liberal interpretation—and that dispute resolution provisions in Chapter 11 NAFTA should be interpreted “without any one-sided doctrinal advantage built in to their text to disadvantage procedurally an investor seeking arbitral relief”; the Tribunal also relied on the opinion of Judge Higgins that there is no rule of restrictive interpretation of jurisdictional clauses in international law; the Tribunal also noted that this dilemma “did not greatly influence our decision in this Award”).

73. Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L ORG. 457, 459 (2000) (arguing: “Transnational dispute resolution seems to have an inherently more expansionary character [than inter-State dispute resolution]; it provides

seems to collide with arbitrators' simple task: to settle the dispute before them, and nothing more.<sup>74</sup> However, as argued, it was exactly the loss of the State control over "transnational" dispute resolution that made these opportunities for tribunals, regardless of their formal mandate.<sup>75</sup> These factors might lead arbitrators to feel less obliged (if perceiving any duty at all) to follow concepts of general international law, turning solely to the development of law in the narrow context of investment disputes.

A clear practical example of this issue is the arbitral application of the rules governing treaty interpretation contained in the VCLT. Generally, tribunals agree that the starting point of each and every treaty interpretation is Article 31 VCLT (either as a treaty or customary rule).<sup>76</sup> However, investment tribunals are quite often criticised for not complying with the actual rules of treaty interpretation as contained in that article,<sup>77</sup> and for using the same rules in highly divergent ways.<sup>78</sup> It is submitted that tribunals have applied the rules of treaty interpretation differently, and will continue to do so, among other reasons, because of opting for either legalistic or teleological points of view in their decision-making, and choosing the decisive arguments accordingly. As it will be discussed below, tribunals indeed use legalistic and teleological notions to form decisive arguments, adjusting the application of the rules of the VCLT as they deem fit. For the present purposes, this reflects a broken bond with general international law, as specific features of investment law are given precedence over the applicable law and its rationale.

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more opportunities to assert and establish new legal norms, often in unintended ways."'). For the suggestion that investment arbitration "is not limited to settling disputes and serving the cause of international peace," and that investment tribunals have contributed significantly in the development of international investment law, see ARMIN VON BOGDANDY & INGO VENZKE, IN WHOSE NAME? A PUBLIC LAW THEORY OF INTERNATIONAL ADJUDICATION 90-94 (2014).

74. See, for example, Romak S.A. (Switzerland) v. The Republic of Uzbekistan, PCA Case No. AA280, Award, ¶ 171 (Nov. 26, 2009) ("Ultimately, the Arbitral Tribunal has not been entrusted, by the Parties or otherwise, with a mission to ensure the coherence or development of 'arbitral jurisprudence.' The Arbitral Tribunal's mission is more mundane, but no less important: to resolve the present dispute between the Parties in a reasoned and persuasive manner, irrespective of the unintended consequences that this Arbitral Tribunal's analysis might have on future disputes in general. It is for the legal doctrine as reflected in articles and books, and not for arbitrators in their awards, to set forth, promote or criticize general views regarding trends in, and the desired evolution of, investment law."'). Cf. Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. The Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, ¶ 66 (July 30, 2010) ("Although there is no doctrine of binding precedent in the ICSID arbitration system, the Committee considers that in the longer term there should develop a *jurisprudence constante* in relation to annulment proceedings." [internal reference omitted]).

75. Keohane, Moravcsik & Slaughter, *supra* note 73, at 458.

76. For example, Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 27 (Apr. 29, 2004) [hereinafter *Tokios Tokelés*].

77. See Thomas W. Wälde, *Interpreting Investment Treaties: Experiences and Examples*, in INTERNATIONAL INVESTMENT LAW FOR THE 21<sup>ST</sup> CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 724, 725 (Christina Binder et al. eds., 2009) (arguing that there is "confusion" in investment arbitral practice, where "[s]tyles of traditional, pre-Vienna public international law mingle freely with styles of reasoning from commercial arbitration, with each player inclined to resort to familiar habits in his or her domestic law and maxims of (usually) pseudo-Latin origin that seem to fit the strategy, that is, retracing from the desired outcome to the expected reasoning" [internal reference omitted]; Wälde attributes this to, *inter alia*, the gradual acceptance of the VCLT rules, and the dominance of commercial lawyers in investment arbitration).

78. For some inconsistencies in arbitral practice regarding treaty interpretation methods, see DOLZER & SCHREUER, *supra* note 28, at 28-30.

The system of investment treaty arbitration thus represents a very fertile field for the use of legalistic and teleological notions in the formation of decisive arguments in arbitral reasoning. There is no mechanism to decide which one of the two should be given priority in principle. Arbitrators might not feel a strong bond with general international law and its views. They might find more reasonable to interpret (or even develop) law as in their view it best satisfies the pursued objectives in the narrow context of international investment law.

### III. UNNEUTRALITY IN INVESTOR-STATE ARBITRAL PRACTICE

An empirical research illustrates that objective interpretation of treaties is clearly preferred by ICSID tribunals,<sup>79</sup> compared to teleological and subjective approaches which appear only as subsidiary means of interpretation of treaties.<sup>80</sup> Nonetheless, the same research found that ICSID tribunals often make references to the object and purpose of the treaty before them (and of its provisions).<sup>81</sup> This Part makes a qualitative analysis of the decisive arguments in arbitral practice based on legalistic and teleological ideals of investment treaty arbitration. The term “legalistic approach” is used to describe decisive arguments which orbit around the notions of consent of the States parties and their intentions as regards the relevant treaty, while the term “teleological approach” aims to describe decisive arguments which concentrate at enhancing investor protection, relying on the purpose of international investment law. Two particular jurisdictional issues were chosen for this analysis, namely the scope (Section A) and the conditions of consent to arbitrate (Section B).

#### A. Struggle over the Scope of Consent

The issue of the scope of consent to arbitrate often appears in arbitral practice, when arbitrators are required to determine whether the dispute submitted to them falls within their authority to adjudicate.<sup>82</sup> Basically, the investor (as the claimant) will argue that the dispute does fall under the applicable dispute resolution clause, whereas the State (the respondent) will argue to the contrary. Naturally, the claimant would be interested in a somewhat expansive interpretation of the jurisdictional provision, while the respondent would prefer a restrictive one.

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79. Fauchald, *supra* note 13, at 316.

80. *Id.* at 316-17 (noting that subjective approach has been taken in only 15 out of the 98 analysed decisions, and that it is surprising that tribunals have not been quite fond of finding the intentions of the parties to the relevant treaty, given the emphasis on bilateralism and contractual issues in investment law; also noting that often it was very hard to distinguish between subjective and teleological methods of treaty interpretation).

81. *Id.* at 322 (noting such references in 48 out of the 98 analysed decisions).

82. See generally August Reinisch, *How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?*, 2 J. INT'L DISP. SETTLEMENT 115 (2011).



## i. Legalistic View on the Scope of Consent

The 2006 award in *Berschader v. Russia* demonstrated one of the strongest commitments to the legalistic ideal of investment law.<sup>83</sup> The Tribunal faced a narrow dispute settlement clause, which allowed arbitrating disputes “relative au montant ou au mode de paiement des indemnités dues en vertu de l’article 5.”<sup>84</sup> Assuming that the ordinary meaning of this clause was clear and that it limited the type of arbitrable disputes under the BIT,<sup>85</sup> the Tribunal engaged in explaining why the restrictive wording of this article was the actual intention of the States parties.<sup>86</sup> The Tribunal was not willing to accept a broader interpretation of this clause basing its decision on a strictly legalistic approach to its reading.

However, it has been said that this ruling of the Tribunal was not crucial, since the case already failed at the issue of indirect investment.<sup>87</sup> It just happens that this issue showed a full clash between legalistic and teleological decisive arguments. While the majority believed that the treaty’s objective of promoting investments cannot amend the intent of the States parties as appearing from the text,<sup>88</sup> the dissenting arbitrator held that it was precisely that objective of the BIT that should influence the interpretation of its text, so as to cover indirect investment.<sup>89</sup> Thus,

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83. Vladimir Berschader & Moïse Berschader v. The Russian Federation, SCC Case No. 80/2004, Award (Apr. 21, 2006) [hereinafter *Berschader* (Award)].

84. Accord entre les Gouvernements du Royaume de Belgique et du Grand-duché de Luxembourg et le Gouvernement de l’Union des républiques socialistes soviétiques, concernant l’encouragement et la protection réciproques des investissements, art. 10, ¶ 1, Feb. 9, 1989. An unofficial English translation of this article refers to disputes “concerning the amount or mode of compensation to be paid under Article 5 of the present Treaty . . .” *Berschader* (Award), *supra* note 83, ¶ 47.

85. *Id.* ¶¶ 152-53 (also noting: “From the ordinary meaning of Article 10.1, it can only be assumed that the Contracting Parties intended that a dispute concerning whether or not an act of expropriation actually occurred was to be submitted to dispute resolution procedures provided for under the applicable contract or alternatively to the domestic courts of the Contracting Party in which the investment is made.”).

86. *Id.* ¶¶ 154-58. See particularly ¶ 158 (dismissing the statement to the contrary of Belgian Minister of Foreign Affairs, because “the Tribunal finds the language of the Treaty to be quite clear and in the view of the Tribunal such language could not possibly lend itself to the interpretation suggested in the explanatory statement.”).

87. *Renta 4 S.V.S.A. et al. v. The Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections, ¶ 23 (March 20, 2009) [hereinafter *Renta 4*].

88. *Berschader* (Award), *supra* note 83, ¶ 144 (“The Tribunal believes, however, that the object of promoting investments as set out in the Preamble does not provide any guidance on whether or not the type of indirect investments relied upon by the Claimants in the instant case is protected by the Treaty. The intention of both Contracting Parties when signing the Treaty may well have been to promote investment between the two countries, but such aim can be achieved by different means and in varying degrees. The wording of the Preamble cannot reasonably be interpreted as a declaration by the Contracting Parties that all forms of investment - direct or indirect - are to be protected under the Treaty.”).

89. Vladimir Berschader & Moïse Berschader v. The Russian Federation, SCC Case No. 80/2004, Separate Opinion of Arbitrator Todd Weiler, ¶ 6 (Apr. 7, 2006) (“Given the Treaty’s objectives, I believe that it is incumbent upon the Tribunal to adopt an interpretation of the terms of Articles 2 and 10 of the Treaty that ensures the promotion of ‘favourable conditions for investments by investors of one Contracting Party in the territory of another Contracting Party.’”) and ¶ 14 (“An interpretation of these terms that would deprive the investors of the rights contemplated in the Treaty – merely by virtue of the corporate structure they chose to make their investment – is one that places form over substance and does not comport with the objectives of the Treaty.”).

the Tribunal applied the same legalistic approach as with the issue of scope of consent,<sup>90</sup> while the dissenting arbitrator argued for an opposite outcome, relying on the teleological ideal of the investment protection regime.

The 2007 jurisdictional decision in *RosInvest v. Russia* is well-known primarily because of its open-minded approach to the question of the application of MFN clauses to dispute resolution clauses.<sup>91</sup> When dealing with the question of the scope of consent, the Tribunal applied a rather strict, legalistic approach. The dispute settlement clause also limited the disputes that could be arbitrated only to certain types,<sup>92</sup> which was confirmed by the Tribunal in its interpretation of the clause, finding that it did not have jurisdiction over the question of the occurrence or the validity of expropriation.<sup>93</sup> Interestingly, the Claimant in that case advanced the argument that the Tribunal should employ a “dynamic interpretation” of the BIT pertaining to the contemporary objectives of investment promotion, in which regard the Tribunal observed: “[s]ince the present context is that of a bilateral treaty, the Tribunal does not have to take up the questions whether other considerations may justify such an interpretation in the context of a long term multilateral convention or human rights.”<sup>94</sup> This observation disqualified the option of taking a teleological point of view, as in the opinion of the Tribunal the BIT represented merely a bilateral arrangement, and not primarily a protective regime.

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90. See *Berschader* (Award), *supra* note 83, ¶ 143 (requiring an express provision for the inclusion of indirect investments, and assuming that the States parties did not have such an intention) and ¶¶ 145-47 (analysing the practice of the States parties).

91. *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. 79/2005, Award on Jurisdiction, ¶¶ 124-39 (Oct. 2007) [hereinafter *RosInvest*]. Essentially, the Tribunal ruled that the relevant MFN clause was applicable to the dispute resolution clause, thus extending the scope of consent. It can be argued that in this part the Tribunal took a teleological point of view, particularly when analysing the protective value of the access to arbitration. See, in that respect, *id.* ¶¶ 130, 132; see also *infra* Part IV, Section C. The award was annulled via a default judgment. See *Stockholms tingsrätt* [TR] [Stockholm District Court] 2011-11-09 T 24891-07 (Swed.); *Svea hovrätt* [HovR] [Svea Court of Appeal] 2013-09-05 T 10060-10 (Swed.).

92. Agreement between the Government of the United Kingdom and the Government of the USSR for the Promotion and Reciprocal Protection of Investments, art. 8, ¶ 1, Apr. 6, 1989 (referring to disputes “either concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article 5 of this Agreement, or concerning the consequences of the non-implementation, or of the incorrect implementation, of Article 6 of this Agreement”).

93. *RosInvest*, *supra* note 91, ¶¶ 108-18.

94. *Id.* at ¶¶ 100, 121.

Unlike the previous two cases, the issue in *SGS v. Pakistan* was whether the Tribunal had jurisdiction over contractual claims.<sup>95</sup> Besides holding that the applicable dispute resolution clause itself did not provide for such jurisdiction,<sup>96</sup> the Tribunal analysed whether that would be possible by virtue of an umbrella clause.<sup>97</sup> Again, the Tribunal emphasised the need to establish the intention of the States parties to the BIT.<sup>98</sup> The Tribunal appears overall quite concerned about possible effects of such a clause on the position of the State,<sup>99</sup> which is why it did not regard that clause as capable of bringing the contract claims under the Tribunal's jurisdiction. The Tribunal even opined that in such circumstances of doubt, "[t]he appropriate interpretive approach is the prudential one summed up in the literature as *in dubio pars mitior est sequenda*, or more tersely, *in dubio mitius*."<sup>100</sup> It also appears that the Tribunal has dismissed teleological concerns in the interpretation of the relevant umbrella clause.<sup>101</sup> Therefore, this decision is another example where a clear legalistic point of view was taken in the interpretative process, creating the decisive arguments accordingly, at the cost of possible teleological approaches.

These three cases represent three clear instances where the tribunals took the legalistic ideal of investment treaty arbitration as their main concern, and built their decisive arguments on that basis. This was done in a clear opposition to the teleological point of view, which was either dismissed, or used by dissenters to advance a contrary argument leading to a different result (*i.e.* affirming, instead of denying jurisdiction).

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95. *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction (Aug. 6, 2003) [hereinafter *SGS v. Pakistan*].

96. *Id.* ¶¶ 156-62. See particularly ¶ 161 ("We recognize that disputes arising from claims grounded on alleged violation of the BIT, and disputes arising from claims based wholly on supposed violations of the PSI Agreement, can both be described as 'disputes with respect to investments,' the phrase used in Article 9 of the BIT. That phrase, however, while descriptive of the *factual subject matter* of the disputes, does not relate to the *legal basis* of the claims, or the *cause of action* asserted in the claims. In other words, from that description alone, without more, we believe that no implication necessarily arises that both BIT and purely contract claims are intended to be covered by the Contracting Parties in Article 9. . . . Thus, we do not see anything in Article 9 or in any other provision of the BIT that can be read as vesting this Tribunal with jurisdiction over claims resting *ex hypothesi* exclusively on contract.").

97. Accord entre la Confédération suisse et la République Islamique du Pakistan concernant la promotion et la protection réciproque des investissements, art. 11, July 11, 1995. The clause in English translation states that "[e]ither Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party." See *SGS v. Pakistan*, *supra* note 95, at ¶ 163.

98. *Id.* at ¶¶ 167, 173.

99. See *id.* at ¶¶ 166-68.

100. *Id.* ¶ 171. For a similar statement see *Noble Ventures*, *supra* note 71, at ¶ 55.

101. *SGS v. Pakistan*, *supra* note 95, at ¶ 165 ("A treaty interpreter must of course seek to give effect to the object and purpose projected by that Article and by the BIT as a whole. That object and purpose must be ascertained, in the first instance, from the text itself of Article 11 and the rest of the BIT. Applying these familiar norms of customary international law on treaty interpretation, we do not find a convincing basis for accepting the Claimant's contention that Article 11 of the BIT has had the effect of entitling a Contracting Party's investor, like SGS, in the face of a valid forum selection contract clause, to 'elevate' its claims grounded solely in a contract with another Contracting Party, like the PSI Agreement, to claims grounded on the BIT, and accordingly to bring such contract claims to this Tribunal for resolution and decision." [internal reference omitted]).

## ii. Teleological View on the Scope of Consent

Probably the best-known decision relying heavily on the teleological notion is the jurisdictional decision in *SGS v. Philippines*.<sup>102</sup> Back in 2004, the Tribunal in that case had to decide whether it had jurisdiction under the relevant umbrella clause, as well as over pure contractual claims.<sup>103</sup> First, when discussing the effect of the umbrella clause, after briefly analysing the language of the clause,<sup>104</sup> the Tribunal turned to examining the object and purpose of the BIT, and stated:

The object and purpose of the BIT supports an effective interpretation of Article X(2). The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended “to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other”. It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments.<sup>105</sup>

The Tribunal then concluded that if the State indeed makes binding obligations towards specific investments, “it seems entirely consistent with the object and purpose of the BIT to hold that they are incorporated and brought within the framework of the BIT by Article X(2).”<sup>106</sup>

Although attempting to distinguish this case from *SGS v. Pakistan*,<sup>107</sup> the Tribunal still expressed its disagreement with the legalistic approach taken in the latter.<sup>108</sup> It appears obvious that in doing so the Tribunal based its arguments on the teleological ideal.<sup>109</sup> Even when arguing that, “in principle,” the dispute settlement clause also gave the Tribunal jurisdiction over pure contractual claims, it relied on

102. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004) [hereinafter *SGS v. Philippines*].

103. See Agreement between the Swiss Confederation and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments, art. VIII, March 31, 1997 (“disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party”); see also *id.* art. X, ¶ 2 (“Each Contracting Party shall observe any obligation it has assumed with regard to specific investments in its territory by investors of the other Contracting Party.”).

104. *SGS v. Philippines*, *supra* note 102, at ¶ 115.

105. *Id.* at ¶ 116; see also *Ecuador v. Occidental Exploration & Production Co.* [2007] EWCA Civ 656, [28] (Eng. & Wales) [hereinafter *Occidental* (Court of Appeal)]; *Stockholms tingsrätt* [TR] [Stockholm District Court] 2014-09-11 T 15045-09 at 34 (Swed.) [hereinafter *Stockholm District Court* (2014)]. Cf. *Czech Republic v. European Media Ventures SA* [2007] EWHC Comm 2581, [23] (Eng. & Wales) [hereinafter *European Media Ventures* (High Court)] (“If the suggestion . . . that it is permissible to resolve uncertainties in the interpretation of a BIT in favour of an investor, who is not a party to the treaty, is said to amount to a rule of interpretation, the suggestion goes rather further than appears to be justified in International law.”).

106. *SGS v. Philippines*, *supra* note 102, at ¶ 117.

107. *Id.* at ¶ 119 (referring to “vague terms” of the clause in the other case).

108. *Id.* at ¶¶ 125-26 (“Moreover the *SGS v. Pakistan* Tribunal appears to have thought that the broad interpretation which it rejected would involve a full-scale internationalisation of domestic contracts—in effect, that it would convert investment contracts into treaties by way of what the Tribunal termed ‘instant transubstantiation’.”).

109. For example, rebutting the argument for contextual interpretation. *Id.* at ¶ 124 (“In particular, it is difficult to accept that the same language in other Philippines BITs is legally operative, but that it is legally inoperative in the Swiss-Philippines BIT merely because of its location.” [internal reference omitted]). Also, linking both this and the object and purpose arguments to the principle of effectiveness.

the applicable treaty's objective of promotion and protection of foreign investment.<sup>110</sup> Generally, this decision reflects a great reliance on the teleological ideal of investment law (through the BIT's object and purpose), with some clear practical effects.

Another interesting case that concerned the issue of the scope of consent was *Tza Yap Shum v. Republic of Peru*.<sup>111</sup> The Tribunal faced a dispute settlement clause which allowed arbitrating disputes "involving the amount of compensation for expropriation."<sup>112</sup> The Tribunal took the view that a broad interpretation of this clause was the appropriate one.<sup>113</sup> Although this decision has been criticised for relying too heavily on the literal meaning of the words used in the BIT,<sup>114</sup> that decision is notable for basing its decisive argument regarding the scope of consent to arbitrate on the teleological ideal of investment law. The Tribunal clearly stated that it aimed to find the "objective meaning" of the dispute resolution clause, by relying on the objective of the BIT.<sup>115</sup> The Tribunal held that the objective "consisted in increasing the flow of private investment between both Contracting Parties," and because of that the treaty should be interpreted "to extend the rights and protections of investors, both in content and form, by the incorporation of protections of international law."<sup>116</sup> This allowed the Tribunal to conclude that not only

110. *Id.* at ¶ 132(c) (and further noting: "Allowing investors a choice of forum for resolution of investment disputes of whatever character is consistent with this aim."); *see id.* at ¶ 177 (finding that the disputing parties have agreed to exclusive jurisdiction of Philippine courts in respect of their contractual claims, the Tribunal stayed the proceedings, pending the resolution of those claims).

111. *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence (June 19, 2009) [hereinafter *Tza Yap Shum* (Jurisdiction)]. English translation from *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment (Feb. 12, 2015) [hereinafter *Tza Yap Shum* (Annulment)].

112. Agreement between the Government of the Republic of Peru and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investment, art. 8, ¶ 3, June 9, 1994.

113. *Tza Yap Shum* (Jurisdiction), *supra* note 111, at ¶ 150.

114. *See* Guiguo Wang, *Consent in Investor-State Arbitration: A Critical Analysis*, 13 CHINESE J. INT'L L. 335, 351 (2014); *see also* Wei Shen, *The Good, the Bad or the Ugly? A Critique of the Decision on Jurisdiction and Competence in Tza Yap Shum v. The Republic of Peru*, 10 CHINESE J. INT'L L. 55, 74 (2011). The Tribunal held: "Firstly, the Tribunal refers to the specific words used by the third paragraph of Article 8. The BIT uses the word 'involucere', which according to the definition given by the Dictionary of the Real Academia Espanola, means 'abarcar, incluir, comprender'. A good faith interpretation of this term indicates that the only requirement in the BIT is that the dispute should 'include' the determination of an amount of compensation and not that the dispute should be restricted to this element. Obviously, other formulations were available such as: 'limited to' or 'exclusively', but the wording used in this provision says 'involving'." *Tza Yap Shum* (Jurisdiction), *supra* note 111, at ¶ 151. The Tribunal also used the contextual approach, stating in ¶ 159: "In fact, the last sentence [of Article 8(3)] leaves no doubt that an investor (of any Contracting Party), when trying to choose a course of action to settle a dispute in accordance with Article 8, finds himself with an irrevocable forum selection clause, also known by the phrase 'fork in the road'. An investor 'shall be entitled' to submit the dispute to the competent court of the Contracting Party' (emphasis added) in accordance with Paragraph 8(2), but if the investor does so, in accordance with Paragraph 8(3), such investor could not under any circumstances resort to ICSID arbitration to settle a dispute 'involving the amount of compensation for expropriation'." The Annulment Committee supported this approach. *See Tza Yap Shum* (Annulment), *supra* note 111, at ¶¶ 98-99.

115. *Tza Yap Shum* (Jurisdiction), *supra* note 111, at ¶ 187.

116. *Id.* (translation in Wang, *supra* note 114, at 351). The Tribunal also expressed reservations as for legalistic considerations. *See Tza Yap Shum* (Jurisdiction), *supra* note 111, at ¶ 153 ("Presumably, in conformity with the wording of the preamble of the BIT, the objective sought when including the right to refer certain disputes to ICSID arbitration is to confer certain benefits for investment promotion. In the event that the Contracting Parties really had the intention to exclude the important issues listed in

the disputes over the quantum of compensation fell under the applicable dispute resolution clause, but also those concerning the occurrence of expropriation.

The 2009 jurisdictional decision in *Renta 4 v. Russia* faced a similar problem of a narrow dispute resolution clause.<sup>117</sup> After reaching the conclusion that the clause was broad enough to cover the issues of validity of expropriation, based on its textual interpretation,<sup>118</sup> the Tribunal stated that that conclusion should be validated against the intentions of the parties to the BIT and its object and purpose.<sup>119</sup> Thereafter, the Tribunal engaged in a sort of a mixed analysis of legalistic and teleological arguments.<sup>120</sup>

Although at some point the Tribunal expressed certain reservations as to the effect of favouring investors,<sup>121</sup> it seems that the teleological point of view has somehow prevailed in its reasoning. This appears clear from the wording that “[i]t cannot seriously be thought that investors would be attracted by a regime that gave them access to international arbitration of the issue of the quantum of compensation but not of whether any compensation is due at all.”<sup>122</sup> Furthermore, relying on the objective of promotion of investments, the Tribunal concluded that the dispute resolution clause could not be read so as to prevent full internationalisation of the dispute, which is, according to it, vital to foreign investors.<sup>123</sup> The Tribunal even quoted, but not clearly and fully relying on it, the *SGS v. Philippines* opinion that it is legitimate “to favour the protection of covered investments” in cases of doubt.<sup>124</sup> Overall, the teleological point of view prevails in the Tribunal’s analysis, which is also supported by its strong criticism of the *Berschader* decision, and the legalistic narrative employed therein.<sup>125</sup> Interestingly, this was not the end of the matter, and Swedish courts clashed over the validity of the award, taking the two opposing approaches in interpreting the arbitration agreement.<sup>126</sup>

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Article 4 from the arbitration process, the Tribunal of course would so determine, although with a certain level of scepticism about whether such a mechanism could possibly help to attract foreign investors.”).

117. Agreement for Reciprocal Promotion and Protection of Investments between Spain and the USSR, art. 10, Oct. 26, 1990 (“Any dispute between one Party and an investor of the other Party relating to the amount or method of payment of the compensation due under article 6 of this Agreement . . .”).

118. *Renta 4*, *supra* note 87, at ¶¶ 27-45. The Tribunal considered that it had the power to rule on “whether Russia’s actions breached international law by depriving the claimants of adequate compensation for the dispossession of which they complain,” but not on the other aspects of the validity of expropriation.

119. *Id.* at ¶ 46.

120. *Id.* at ¶¶ 47-59. Despite the analysis of possible intentions of the parties throughout this section, the teleological point of view seems prevalent due to such remarks as in ¶¶ 52, 56 and 57.

121. *Id.* at ¶ 55 (“[Article 31 VCLT] does not for example compel the result that all textual doubts should be resolved in favour of the investor. The long-term promotion of investment is likely to be better ensured by a well-balanced regime rather than by one which goes so far that it provokes a swing of the pendulum in the other direction.”) and ¶ 57 (noting, in relation to the *SGS v. Philippines* case, that “[t]o ‘favour the protection of covered investments’ is not equivalent to a presumption that the investor is right”).

122. *Id.* at ¶ 52.

123. *Id.* at ¶ 56.

124. *Id.* at ¶ 57.

125. *Id.* at ¶¶ 22-26, 47, 53. See also *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, ¶¶ 88-92 (May 31, 2017) (observing concerns advanced by both *RosInvest* and *Renta 4* tribunals, reaching the result similar to the latter).

126. Cf. Stockholm District Court (2014), *supra* note 105, at 34-35 (employing a teleological approach in affirming the Tribunal’s jurisdiction); with Svea hovrätt [HovR] [Svea Court of Appeal] 2016-01-18 T 9128-14 at 5-7, 9-10 (Swed.) (employing a legalistic approach in finding that the Tribunal lacked jurisdiction over the issues of validity of expropriation).

## iii. Scope of Consent—Conclusion

The decisions presented above illustrate how dispute settlement clauses, and the scope of consent to arbitrate determined therein, could be viewed from two different points of view. While one approach would insist on a literal (or even restrictive) reading of the clause, another approach suggests reading it in the light of the protective objectives of the given regime.<sup>127</sup> As this dilemma appears when it is not clear whether the dispute falls within the scope of the applicable dispute resolution clause, the two approaches lead to different interpretive outcomes, namely upholding (legalistic approach), or dismissing the jurisdictional objection (teleological approach).

B. *Struggle over the Conditions of Consent*

Dispute resolution clauses in investment treaties may contain various conditions prior to the institution of arbitration (conditions precedent),<sup>128</sup> which triggers the question of whether they pertain to the tribunal's jurisdiction or admissibility of the claim,<sup>129</sup> as well as whether they can be somehow bypassed. Although the majority of tribunals agree that conditions precedent should be considered as issues of admissibility, the question is far from settled, and represents an attractive one for the expression of different approaches to reading the relevant treaty.<sup>130</sup> Naturally, the respondent State would aim at precluding the investor from reaching the merits phase of the case, and thus would plead strict reading of the conditions precedent, while the investor (the claimant) would be interested to somehow loosen the formalities it has to go through.

## i. Legalistic View on the Conditions of Consent

Perhaps overly stern formalities that may result from the application of a strictly legalistic approach in decision-making could be seen in *Waste Management*

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127. For other examples of teleological decisive arguments, see *Millicom*, *supra* note 28, at ¶¶ 65, 71 (relying on protective objectives in ruling on the existence of an arbitration agreement and the circle of protected investors); see also *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues, ¶ 35 (Dec. 6, 2000) (relying on the purposes of NAFTA to advocate in favour of broadening the circle of protected investors); *Cour d'appel de Paris [Paris Court of Appeal] No. 15/01040* at 6 (April 25, 2017) (Fr.) (relying on protective objectives of the BIT in qualifying dual nationals as protected investors).

128. Such as to notify the respondent State of the claim and to attempt to settle the dispute amicably, to litigate before domestic courts for a certain period of time, or even to exhaust local remedies.

129. See, for the distinction between jurisdiction and admissibility, Jan Paulsson, *Jurisdiction and Admissibility*, in *GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 601* (Gerald Aksen et al. eds., 2005). It has also been argued that rules of *seisin* of a tribunal are procedural issues which concern neither the issues of jurisdiction nor of admissibility. See ZACHARY DOUGLAS, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* 151-60 (2009).

130. See *id.*

*v. Mexico*.<sup>131</sup> Given the NAFTA basis of the proceedings, the Claimant was required to waive its right to pursue remedy in another forum,<sup>132</sup> which, as the Tribunal found, it failed to do.<sup>133</sup> While the majority considered this condition to be a crucial condition to its jurisdiction,<sup>134</sup> the dissenting arbitrator disagreed with both the reasoning and result achieved by the majority, despite taking a *prima facie* legalistic point of view. The dissenting arbitrator analysed extensively the wording of the Article 1121 NAFTA and the intention of its parties.<sup>135</sup> Nevertheless, that some teleological concerns did play role in the dissent is visible from the fact that the dissenting arbitrator often refers to the price that would have to be paid by the Claimant if asked to satisfy some strict conditions.<sup>136</sup> Eventually, the Claimant re-submitted the dispute to arbitration, this time with a proper waiver, but ultimately lost on the merits.<sup>137</sup>

A pure legalistic approach can be found in the case of *Wintershall v. Argentina*.<sup>138</sup> The applicable dispute settlement clause required prior litigation before local courts.<sup>139</sup> Faced with the argument that the Claimant did not need to resort to

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131. *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award (June 2, 2000) [hereinafter *Waste Management* (Award)].

132. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1121, ¶ 1, Dec. 17, 1992, 32 I.L.M. 289 (1993) (“A disputing investor may submit a claim under Article 1116 to arbitration only if: . . . b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.”).

133. *Waste Management* (Award), *supra* note 131, at ¶¶ 27, 31. Basically, the Tribunal found that the Claimant did not make a proper waiver, because of certain reservations and the lack of real intent to abandon the domestic proceedings.

134. *See id.* at ¶ 17 and the Operative part; *see also* *The Renco Group Inc. v. Republic of Peru*, Case No. UNCT/13/1, Partial Award on Jurisdiction (July 15, 2016) (where a tribunal took quite a legalistic approach in finding that it lacked jurisdiction due to the failure of the Claimant to observe a similar waiver requirement). *Cf.* *Ampal-American Israel Corporation et al. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, ¶ 334 (Feb. 1, 2016) (offering the possibility to the Claimant to “cure” the abuse of process identified in the pursuit of parallel proceedings on the same claim).

135. *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Dissenting Opinion of Arbitrator Keith Highet (May 8, 2000). The dissenting arbitrator held that the required waiver was pertaining only to treaty claims, not to contractual ones.

136. *See id.* ¶¶ 44, 54, 61.

137. *See* *Waste Management, Inc. v. United Mexican States* (“Number 2”), ICSID Case No. ARB(AF)/00/3, Award (Apr. 30, 2004).

138. *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award (Dec. 8, 2008).

139. Treaty between the Federal Republic of Germany and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments, art. 10, ¶¶ 2, 3(a), Apr. 9, 1991, 1910 U.N.T.S. 198 [hereinafter *Argentina-Germany BIT*] (“If any dispute in the terms of paragraph 1 above could not be settled within the term of six months, counted as from the date on which any of the Parties had brought it forth, at the request of any of the parties, it shall be submitted to the courts of competent jurisdiction of the Contracting Party in whose territory the investment was made. . . . The dispute may be submitted to an international arbitral tribunal in any of the following events: (a) At the request of any of the parties in dispute, if no decision on the merits of the case had been reached following eighteen months from the date when the judicial proceeding provided for in paragraph 2 of this Article was initiated, or if the decision had been reached and the dispute between the parties still continued.”).



local courts,<sup>140</sup> the Tribunal applied a very strict reading of the treaty clause. Basically, the ruling in this respect can be divided into two parts: where the Tribunal expressed its commitment to the legalistic ideal of investment treaty arbitration, and where the Tribunal gave effect to that approach in interpreting the relevant clause.

First, the Tribunal relied on the VCLT and the intention of the parties to the BIT to conclude that third party beneficiaries must comply with the conditions set by the treaty drafters, which was indeed intended by the two contracting States.<sup>141</sup> Then, the Tribunal turned to an analysis of the text of the dispute settlement clause to confirm its conclusion.<sup>142</sup> It seems that the Tribunal expressly gave precedence to legalistic over teleological concerns when dismissing the argument that the object and purpose of the treaty should provide a direct access to ICSID arbitration.<sup>143</sup> The Tribunal also challenged the proposition that the conditions prior to the institution of arbitration are usually treated as merely procedural, and not jurisdictional issues, on the basis that it all depends on the language and context of the applicable treaty.<sup>144</sup> That understanding was crucial for another strict point made by the Tribunal by applying the legalistic approach—that such a local litigation requirement could not be bypassed by relying on an MFN clause.<sup>145</sup>

Finally, when faced with the issue of the application of an MFN clause with the aim of bypassing the same requirement of prior domestic litigation, the Tribunal in the case of *Daimler v. Argentina* expressed quite a legalistic approach.<sup>146</sup> It started from the mandatory character of the terms used in the dispute settlement clause, and the clarity of the States parties' intentions regarding the structure of the dispute settlement process.<sup>147</sup> It eventually opined that all the preconditions to arbitration set forth in a BIT were of jurisdictional nature, because "[t]he mere fact of their inclusion in a bilateral treaty indicates that they are reflections of the sovereign agreement of two States – not the mere administrative creation of arbitrators," and

140. *Wintershall*, *supra* note 138, ¶¶ 109.2-3.

141. *Id.* ¶¶ 114-18. *See particularly* ¶ 117 ("In the present case the Contracting Parties, (i.e. the Republic of Argentina and the Federal Republic of Germany) have been left free to provide, (and have specifically provided for) a local-remedies clause before resorting (ultimately) to ICSID arbitration. Since the Claimant (a German national) can only make a claim under the Argentina-Germany BIT, and under no other document, when the Claimant Wintershall so makes a claim – (as it has done in the present case) – it has no option but to comply with the closely – interlinked conditions mentioned in Article 10, before exercising its right to ICSID arbitration – simply because that is the expressed will of the Contracting States.").

142. *Id.* at ¶¶ 119-22.

143. *Id.* at ¶ 155 ("Undoubtedly, the promotion and protection of investment is an object or purpose of the BIT but that promotion and protection in the Argentina-Germany BIT is to be 'on the basis of an agreement' (i.e. on the basis of the terms of the Treaty – the BIT): which could not possibly exclude the provisions of Article 10(2). If the object and purpose had been to have an immediate unrestricted direct access to ICSID arbitration, then inclusion of Article 10(2) would have been otiose and superfluous. Therefore, the assumption and assertion made in this proceeding (and in some decisions of ICSID Tribunals as well), that since the object and purpose of a BIT is to protect and promote investments, unrestricted direct access to ICSID must be presumed, is contrary to the text (and context) of this BIT, i.e., the Argentina-Germany BIT." [emphasis in the original]).

144. *Id.* at ¶¶ 133-53, and particularly 142.

145. *See id.* at ¶¶ 160-97.

146. The applicable BIT required litigating domestically for 18 months, as a condition precedent to the institution of arbitration. *See Argentina-Germany BIT*, *supra* note 139.

147. *Daimler* (Award), *supra* note 71, at ¶¶ 180-83.

that “[t]hey set forth the conditions under which an investor-State tribunal may exercise jurisdiction with the contracting state parties’ consent, much in the same way in which legislative acts confer jurisdiction upon domestic courts.”<sup>148</sup>

The Tribunal relied heavily on the *Wintershall* award,<sup>149</sup> and generally permeated the legalistic point of view throughout its entire reasoning.<sup>150</sup> When rejecting the possibility of bypassing the local litigation requirement via the MFN clause, it gave precedence to legalistic over teleological concerns.<sup>151</sup> On the other hand, the dissenting arbitrator was highly critical towards the majority’s requirement for “affirmative evidence” of consent to arbitrate, as an expression of its legalistic approach.<sup>152</sup> The teleological approach taken by the dissenting arbitrator is clearly visible when discussing the interpretation of the MFN clause and its effect to the dispute settlement clause.<sup>153</sup> Later on the Claimant argued that requiring “affirmative evidence” of consent to arbitrate in fact imposed on it an improper burden of proof, but that argument was dismissed by the Annulment Committee, which simply noted the legalistic approach undertaken by the Tribunal.<sup>154</sup> Another case following the *Wintershall* stream and setting the standard of “affirmative evidence” was *ICS v. Argentina*.<sup>155</sup> Dealing with a similar local litigation requirement, the Tribunal found that it was a strict, jurisdictional one,<sup>156</sup> and that it was not avoidable by virtue

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148. *Id.* at ¶ 193.

149. *See id.* at ¶¶ 181, 193.

150. For the principle of consent and its implications as to the (subjective) interpretation of treaties, see *id.* at ¶¶ 168-78. For the rejection of the argument that the domestic litigation clause should not be given effect because of its nonsensicality, see *id.* at ¶ 198.

151. *See id.* at ¶ 258 (“In considering the application of this framework to the present matter, one must bear in mind that the Contracting State Parties adopted all of the provisions of the Treaty together as a whole. In one fell swoop they nodded their assent not only to the BIT’s objects and purposes, as expressed in the Preamble, but also to the various treatment standards set forth in Articles 1 to 9 (including the MFN clauses) as well as the international dispute resolution procedures set forth in Article 10. This indisputably evinces the State Parties’ belief that all of these provisions – including Article 10’s requirement of an 18-month submission of any claims to the domestic courts of the Host State – are perfectly consistent with the objects and purposes of the Treaty.”); *see also id.* at ¶ 259 (“The question is not whether allowing the Claimant to import all or portions of a comparator BIT’s investor-State dispute resolution clause would better protect and promote investment, nor whether the Claimant would prefer to be able to do so, but rather whether Germany and Argentina, in concluding the BIT, agreed to protect and promote investment in that particular manner.” [internal references omitted]).

152. *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Dissenting Opinion of Judge Charles N. Brower, ¶¶ 3-11 (Aug. 15, 2012) [hereinafter *Daimler* (Dissent)].

153. *Id.* at ¶¶ 17-38. *See*, in particular, the discussion on the scope of the term “treatment” and its ability to include the access to international arbitration, *id.* at ¶ 20 (“It is difficult to imagine a more fundamental aspect of an investor’s ‘treatment’ by a host Government than that investor’s ability to exercise and defend its legal rights by prompt access to dispute settlement mechanisms, and fair and efficient administration of justice.” [internal references omitted]).

154. *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, ¶¶ 279-85 (Jan. 7, 2015). *See particularly* ¶ 284 (“A reading of the above quoted paragraphs and a review of the Award makes it clear that the Tribunal did not impose a burden of proof on either Party; it simply stated that consent of the State cannot be presumed and therefore must be established. Thereafter the Tribunal noted that it was its duty, based on the different issues raised by the Parties, to identify the true will of the States when expressing their consent to the BIT.”).

155. *ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, ¶¶ 249, 257 (Feb. 10, 2012) (relying on *Wintershall*), ¶ 309 (“affirmative evidence” standard as a consequence of the Tribunal’s legalism) [hereinafter *ICS Inspection*].

156. *Id.* at ¶¶ 251, 262.

of an MFN clause.<sup>157</sup> Again, the Tribunal gave precedence to legalistic over teleological concerns in reaching its conclusions.<sup>158</sup>

## ii. Teleological View on the Conditions of Consent

In the case of *Bayindir v. Pakistan*, the Tribunal was concerned with the failure of the Claimant to notify the Respondent of the dispute and attempt to settle the dispute amicably.<sup>159</sup> After acknowledging that the Claimant's domestic actions could not be considered notices of the dispute under the BIT,<sup>160</sup> the Tribunal concluded that the requirement to file a notice of dispute to the host State was not a jurisdictional requirement,<sup>161</sup> and that therefore it was not precluded from exercising jurisdiction.<sup>162</sup>

In reaching that conclusion, the Tribunal relied heavily on the object and purpose of the dispute settlement provision, rejecting what it called a "formalistic" approach.<sup>163</sup> While Pakistan argued that the clause requiring notice of the dispute was "a 'carefully crafted' limitation of the consent given by the parties to the BIT,"<sup>164</sup> the Tribunal held that "the purpose of the notice requirement is to allow negotiations between the parties which may lead to a settlement."<sup>165</sup> It finally concluded that "preventing the commencement of the arbitration proceedings until six months after the 4 April 2002 notification would, in the circumstances of this case, amount to an unnecessary, overly formalistic approach which would not serve to protect any legitimate interests of the Parties."<sup>166</sup> Arguably, when referring to the "legitimate interests of the Parties," the Tribunal was referring solely to the interests of the Claimant. In its view the purpose of the requirement to negotiate was merely to provide another opportunity for the Claimant to get what it seeks. On the other hand, accepting an "overly formalistic" approach would certainly serve the interests of at least one party in that arbitration—the Respondent. Nevertheless, the Tribunal does not recognise that argument.

157. *Id.* at ¶ 326.

158. *Id.* at ¶¶ 262, 271-3, 278-80, 296, 309, 316-7 (prevailing legalism); and *id.* at ¶¶ 265, 277, 281, 323 (rebutting teleology).

159. Agreement Between the Republic of Turkey and the Islamic Republic of Pakistan Concerning the Reciprocal Promotion and Protection of Investments, art. VII, March 16, 1995 ("Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle these disputes by consultations and negotiations in good faith." It is specified that arbitration can be initiated "if these disputes cannot be settled in this way within six months following the date of the written notification.").

160. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, ¶¶ 90-94 (Nov. 14, 2005) [hereinafter *Bayindir*].

161. *Id.* at ¶ 95.

162. *Id.* at ¶ 102.

163. *Id.* at ¶¶ 96 ("this Tribunal considers that the real meaning of Article VII of the BIT is to be determined in the light of the object and purpose of that provision"), 102.

164. *Id.* at ¶ 97(i).

165. *Id.* at ¶ 98.

166. *Id.* at ¶ 102. In reaching this conclusion, the Tribunal relied on the *Lauder* case. See Ronald S. *Lauder v. The Czech Republic*, UNCITRAL *ad hoc* arbitration, Final Award, ¶¶ 187-91 (Sept. 3, 2001).

The Tribunal in the case of *Siemens v. Argentina* allowed the Claimant to bypass the local litigation requirement by relying on the relevant MFN clause.<sup>167</sup> The Tribunal made it clear that it was led primarily by teleological concerns.<sup>168</sup> Rejecting the argument that the applicable dispute settlement clause was specially drafted and negotiated, the Tribunal noted that it “feels bound, in its interpretation of the Treaty, by the expressed intention of the parties to promote investments and create conditions favorable to them.”<sup>169</sup> Interestingly, the Tribunal appears to build its argument on a legalistic pattern—starting from the question what was the intention of the States parties—but then takes the object and purpose of the treaty for the only relevant part of that intention.<sup>170</sup> This decision is notable for an overall strong reliance on the protective purpose of investment treaties in general.<sup>171</sup>

The case of *Abaclat et al. v. Argentina* is known for its innovation of “mass claims” in investment treaty arbitration.<sup>172</sup> When it comes to the conditions prior to the institution of arbitration, the case is equally interesting. The applicable BIT required an attempt of amicable settlement, as well as litigating the dispute for 18 months before domestic courts.<sup>173</sup> After concluding that the consultations indeed did take place, but also that the requirement for consultations itself was “not to be considered of a mandatory nature but as the expression of the good will of the Parties to try firstly to settle any dispute in an amicable way,”<sup>174</sup> the Tribunal went to analyse whether the requirement of local litigation was a mandatory one. It held that that was not the case because “it would be unfair to deprive the investor of its right to resort to arbitration based on the mere disregard of the 18 months litigation requirement.”<sup>175</sup>

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167. *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶¶ 79-110 (Aug. 3, 2004) [hereinafter *Siemens*]. The applicable BIT was also Argentina-Germany BIT, *supra* note 139.

168. *Siemens*, *supra* note 167, at ¶ 81 (“The Tribunal considers that the Treaty has to be interpreted neither liberally nor restrictively, as neither of these adverbs is part of Article 31(1) of the Vienna Convention. The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty ‘to protect’ and ‘to promote’ investments. The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favorable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. Both parties recognize that the promotion and protection of these investments by a treaty may stimulate private economic initiative and increase the well-being of the peoples of both countries. The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative.”).

169. *Id.* at ¶ 106.

170. *Id.*

171. See, for example, in the context of the scope of the MFN clause, *id.* at ¶ 102 (“[T]he Tribunal finds that the Treaty itself, together with so many other treaties of investment protection, has as a distinctive feature special dispute settlement mechanisms not normally open to investors. Access to these mechanisms is part of the protection offered under the Treaty. It is part of the treatment of foreign investors and investments and of the advantages accessible through a MFN clause.”).

172. In that respect, it should be noted that the Tribunal relied heavily on the object and purpose of both the BIT and the ICSID Convention when ruling on its jurisdiction over and admissibility of mass claims procedure. See *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 490, 519, 528, 535, 547 (Aug. 4, 2011) [hereinafter *Abaclat* (Jurisdiction)].

173. Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments, art. 8, ¶¶ 1-3, May 22, 1990.

174. *Abaclat* (Jurisdiction), *supra* note 172, ¶¶ 552-66.

175. *Id.* at ¶ 583 (continuing: “The reason is that such disregard would not have caused any real harm to the Host State, whilst in contrast, the deprivation of the investor’s right to resort to arbitration would, in effect, deprive him of an important and efficient dispute settlement mean.”).

In reaching that conclusion, the Tribunal emphasised the centrality of the teleological concerns in its analysis.<sup>176</sup> For the Tribunal, the resort to international arbitration is obviously the main protective means of the BIT, against which the other criteria are to be assessed.<sup>177</sup> It is an idea which can be traced throughout the entire decision, openly based on teleological considerations as opposed to the legalistic ones.<sup>178</sup> Indeed, arbitration as something granted even influenced the Tribunal to dismiss the argument that the conditions precedent pertained to its jurisdiction.<sup>179</sup>

On the other hand, the dissenting arbitrator argued that the conditions of consultation and local litigation were indeed conditions of the Tribunal's jurisdiction, precisely because they were incorporated in the jurisdictional clause by the BIT's drafters.<sup>180</sup> But then, regardless of the qualification of the two conditions, the dissenting arbitrator noticed that the Tribunal left the two conditions completely meaningless (the first one by denying its mandatory nature, and the other by finding that its disregard was not sufficient for the dismissal of the case).<sup>181</sup> Finally, the dissent argued that the Tribunal's assessment of the interests at stake, concerning the failure to litigate before domestic courts, completely disregarded the requirements under the treaty.<sup>182</sup> The entire dissenting opinion is based on the legalistic argument that

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176. *Id.* at ¶¶ 579-80 (referring, however, to the object and purpose of the dispute settlement clause: "Thus, the Tribunal is of the opinion that Claimants' disregard of the 18 months litigation requirement is in itself not yet sufficient to preclude Claimants from resorting to arbitration. The real question is whether this disregard, based on its circumstances, can be considered compatible with the object and purpose of the system put in place by Article 8, or whether it goes against it." The Tribunal identified the object and purpose of Article 8 as "aimed at providing the disputing parties with a fair and efficient dispute settlement mechanism," and opined that as a consequence "the idea of fairness and efficiency must be taken into account when interpreting and determining how the system is supposed to work and what happens if one part of the system fails or is otherwise disregarded by one party").

177. *Id.* at ¶ 584 ("This conclusion derives more from a weighting of the specific interests at stake rather than from the application of the general principle of futility: It is not about whether the 18 months litigation requirement may be considered futile; it is about determining whether Argentina's interest in being able to address the specific claims through its domestic legal system would justify depriving Claimants of their interests of being able to submit it to arbitration."). *Cf.* Republic of Argentina v. BG Group, PLC, 665 F.3d 1363, 1371-73 (D.C. Cir. 2012) (rejecting the ability of the pro-arbitration domestic policy to override the intentions of the party-States as reflected in the text of the treaty), *rev'd*, BG Group, PLC v. Republic of Argentina, 134 S. Ct. 1198 (2014) (dissenting opinion by Roberts, C. J.) (taking a legalistic approach to qualify a local litigation requirement as a condition of consent).

178. *See Abaclat* (Jurisdiction), *supra* note 172, at ¶ 490 ("... where the BIT covers investments, such as bonds, which are susceptible of involving in the context of the same investment a high number of investors, and where such investments require a collective relief in order to provide effective protection to such investment, it would be contrary to the purpose of the BIT and to the spirit of ICSID, to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration. In such cases, consent to ICSID arbitration must be considered to cover the form of arbitration necessary to give efficient protection and remedy to the investors and their investments, including arbitration in the form of collective proceedings."); *see also id.* at ¶ 519 (deciding whether the silence of the ICSID Convention on collective actions should be treated as "qualified silence," the Tribunal relied on the purpose of the BIT and "the spirit of ICSID" to conclude in the negative). *See also supra* note 175 and accompanying text.

179. *Abaclat* (Jurisdiction), *supra* note 172, at ¶¶ 493-96 (distinguishing between the questions of the existence of consent, and "the implementation of consent").

180. *Abaclat et al. v. Argentine Republic*, ICSID Case No. ARB/07/5, Dissenting Opinion of Professor Georges Abi-Saab, ¶¶ 23-24 (Aug. 4, 2011).

181. *Id.* at ¶¶ 25-28.

182. *Id.* at ¶¶ 30-33 (noting that the "balancing of interests" was already done by the States parties to the BIT themselves when they drafted the dispute settlement clause; that the Tribunal judged *ex aequo et bono*, which it was not authorised to do; and finally challenging the proposition that investment arbitration was the only available remedy to the investors).

the Tribunal disregarded the terms of the treaty, as concluded by the States parties, in favour of retaining the case. As seen above, the Tribunal was indeed led by the teleological concerns, constantly bearing the ideal of the access to arbitration in mind, and positioning it in opposition to the requirements of the treaty.

### iii. Conditions of Consent—Conclusion

These decisions show how the legalistic and teleological ideals of international investment arbitration can lead to different interpretive outcomes. Preference given to one of these two ideals would eventually lead to either seeing an obstacle on the way to the merits (by finding that the condition at hand pertains to the tribunal's jurisdiction and/or that it cannot be bypassed), or avoiding one (on the grounds that the same condition is not as important as to deprive the tribunal of its jurisdiction and/or that it can be somehow bypassed).

## IV. NEVER-ENDING EXCUSES: "THE TRUTH IS OUT THERE"

Some years ago, Thomas W. Wälde wrote about "pro-State and pro-investor approaches" and "the dictionary versus policy approach."<sup>183</sup> He concluded that it was "difficult to find a consistent pro-State or pro-investor approach in any particular weighting given to the interpretive methods outlined in the Vienna Convention's Articles 31-3," but that it was "possible to find a particular preference for the State, and to some extent also the investor's legal position, in the selection of traditional interpretation maxims."<sup>184</sup> The argument that is developed here aims at a broader perspective from the use of the interpretive tools. Namely, by taking either the legalistic or teleological point of view, besides dismissing the other one, an arbitrator gets an opportunity to adjust the use of the interpretive tools contained in the VCLT or elsewhere. This is primarily so because the legalistic and teleological ideals discussed here derive their substance outside the interpreted treaty, from the investment treaty arbitration system as such. To advance this argument, this Part identifies the contents and rationales (Section A) and *modus operandi* (Section B) of legalistic and teleological decisive arguments, and lastly, it addresses their reach (Section C).

### A. Contents and Rationales

Treaties differ, by their extent and role, as well as by the emphasis on different aspects in their interpretation.<sup>185</sup> But these aspects remain part of the same process of treaty interpretation, and there are no special interpretive rules for different types of treaties, which would be adjusted to lead to different interpretive outcomes.<sup>186</sup>

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183. See Wälde, *supra* note 77, at 731-45.

184. *Id.* at 732-33.

185. See VILLIGER, *supra* note 11, at 427-28 (arguing that the intentions of States parties are more emphasised when it comes to treaties-contracts, while teleological interpretations are used in the context of multilateral (or legislative) treaties, constitutions of international organisations, and human rights treaties).

186. It is often said that the reliance on the object and purpose of a treaty cannot lead to the outcomes that would exceed an interpretive, and become legislative exercise. *Id.* at 428.

The legalistic and teleological decisive arguments discussed here do lead to different outcomes, and they do so because they find their merit outside the interpretive toolkit. Essentially, it can be said that legalistic approaches aim to give effect to the terms of the treaty as intended and consented to by the States parties, based on the traditional views of public international law, while teleological approaches aim to give effect to investment protection as a phenomenon independent of any particular treaty. To defend this argument, it is necessary to examine the two approaches as appearing in the above-discussed practice, and to pay particular attention to the instances where they (*prima facie* looking) cannot be clearly distinguished.

It is well known that investment tribunals often pursue a “balanced” approach when interpreting dispute settlement clauses, primarily following the opinion that there are no special rules to be applied in such situations.<sup>187</sup> However, such an approach is not without problems, and arguably that is because of differing views that can be applied to international investment law.<sup>188</sup> In such circumstances, it seems reasonable to expect arbitrators to give preference to one or the other aspect in interpreting the treaty before them. It might be completely reasonable to expect that one arbitrator insists on the examination of the intent of the States parties to the BIT, and another one on giving full effect to the protective purpose of that BIT or international investment law as a whole.<sup>189</sup>

However, it is not always easy to distinguish between the approaches (as defined in this article) taken by arbitrators in their reasoning, be it awards or dissents. For example, when reading the dissenting opinions in *Waste Management v. Mexico* and *Daimler v. Argentina*, one can notice quite legalistic narratives, concentrating on the intentions of the States parties and discussing “pure” law.<sup>190</sup> They still qualify as teleological, for one particular reason. Both of these dissents attribute great weight to the interests of only one of the disputing parties (investors), and introduce other notions aimed to protect solely investors, such as the concept of denial of justice.<sup>191</sup> Therefore, the distinguishing factor that should be followed, it is submitted, is to identify the cause of the argument, and not the narrative of the reasoning. The question is whether the tribunal or the dissenting arbitrator is advocating for the application of what the States parties consented to,<sup>192</sup> or for achieving a better protection of the beneficiaries’ interests.<sup>193</sup>

The same confusion can be observed in the *Noble Ventures v. Romania* decision, which appeared highly legalistic, but essentially followed the teleological ideal of investment treaty arbitration.<sup>194</sup> The Tribunal talked extensively about the

187. See *supra* note 11; see also Oil Platforms (separate opinion by Higgins, J.), *supra* note 70, at ¶ 35.

188. Wälde, *supra* note 77, at 736 (“It [balanced approach] does not, however, solve automatically difficult questions concerning the relationship between traditional customary international law which tends to show more deference to State sovereignty in relation to non-State actors, and investment treaties which tend to create intentionally and explicitly special rules (*lex specialis*), often in conscious deviation from the earlier, generally controversial, and not clearly defined customary law regime.”).

189. This can be observed, for example, in *Berschader*. See *supra* notes 88-89 and accompanying text.

190. See *supra* notes 135-136 and 152-153 and accompanying text.

191. Thus, Arbitrator Brower in *Daimler* argued that the access to international arbitration should be covered by the standards of fair and equitable treatment and denial of justice. See *Daimler* (Dissent), *supra* note 152, at ¶ 20. Similarly, the Tribunals in the *Abaclat* and *Bayindir* cases took the access to international arbitration as an imperative in their interpretations of the treaties, thus observing the interests of only one party in the process. See *supra* notes 165-166, 177-179 and accompanying text.

192. For example, *Berschader*, *SGS v. Pakistan*, *Wintershall*, *Daimler* and *ICS Inspection*.

193. For example, *SGS v. Philippines*, *Tza Yap Shum*, *Renta 4*, *Bayindir*, *Siemens* and *Abaclat*.

194. *Noble Ventures*, *supra* note 71.

separation between international and domestic legal orders when analysing the effect of an umbrella clause, even concluding that “the identification of a provision as an ‘umbrella clause’ can as a consequence proceed only from a strict, if not indeed restrictive, interpretation of its terms.”<sup>195</sup> However, no effect given to that narrative can be found in the reasoning. What was given effect was the Tribunal’s reliance on the object and purpose of the BIT to justify an interpretation favouring the investor.<sup>196</sup> Clearly, the reliance on the teleological ideal of investment arbitration formed the decisive argument, while at the same time it was incorporated within a broader, legalistic narrative.

Such instances of incorporating teleological approaches within legalistic narratives may attempt to hide or translate true decisive arguments.<sup>197</sup> Their rationale is straightforward: if arbitrators appear as clearly disregarding the basic principles governing the international legal order in constructing their own jurisdiction, they risk the authority of the award, both formally and substantially.<sup>198</sup> Ignoring the intentions of the States parties to the relevant BIT, and concentrating solely on the purpose of international investment law as such, would indeed amount to such practice, and it would be surprising to see such an award survive.<sup>199</sup> Hence, an arbitrator advancing an argument that relies heavily on the teleological ideal of investment treaty arbitration at the same time needs to “hide,” or translate such a reliance into a legalistic narrative, aiming to render his reasoning “balanced.”<sup>200</sup>

Equally, an arbitrator advancing a legalistic decisive argument aims at certain balance by including some teleological considerations, motivated by the instructions of the VCLT, but which usually remain indecisive.<sup>201</sup> The *Berschader* decision is a good example.<sup>202</sup> Although appearing quite legalistic, the Tribunal in that case did not avoid discussing the object and purpose of the treaty before it, but it argued that that object and purpose should be achieved within the limitations stemming from the treaty’s text and reflecting the intentions of the States parties.<sup>203</sup> It

195. *Id.* at ¶¶ 53-55.

196. *Id.* at ¶ 52 (“While it is not *permissible*, as is too often done regarding BITs, to interpret clauses exclusively in favour of investors, here such an interpretation is justified.”). Similarly, see *European Media Ventures* (High Court), *supra* note 105, ¶¶ 16, 23, 48.

197. For example, *Tokios Tokelés*, *supra* note 76, ¶¶ 31-32, 39 (insisting that the rejection of a restrictive interpretation of the definition of “investor” was built on legalistic concerns, but verifying the broad understanding of the same provision against the BIT’s object and purpose); see also *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Jurisdiction, ¶¶ 130, 143-47 (Dec. 19, 2012) (holding that a domestic litigation clause must be interpreted so as to achieve the object and purpose of the treaty, but criticising from a legalistic perspective the *Abaclat* Tribunal’s approach to the same issue).

198. Formally, such an award could be annulled or its recognition and enforcement could be refused; see *supra* notes 31-32. Substantially, such an award would not be seen as persuasive and/or “precedential.” See also Federico Ortino, *Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures*, 3 J. INT’L DISP. SETTLEMENT 31, 47-51 (2012) (identifying “minimalism” in arbitral reasoning as one of the “egregious failures”).

199. Because investment arbitration is still primarily based on State consent to arbitrate contained in investment treaties. See *supra* Part II, Section A, Subsection 1.

200. On the role of audiences in the formation of arbitral reasoning, see Ingo Venzke, *Judicial authority and styles of reasoning: self-presentation between legalism and deliberation*, in ESTABLISHING JUDICIAL AUTHORITY IN INTERNATIONAL ECONOMIC LAW 240 (Joanna Jemielniak et al. eds., 2016).

201. Investment tribunals are also known for the tendency to extend their discussions. See Joel Dahlquist, *Beside the point—on obiter dicta in investment treaty arbitration*, 32 ARB. INT’L 629 (2016).

202. *Berschader* (Award), *supra* note 83.

203. See *supra* note 88. For similar approaches, see *SGS v. Pakistan* at *supra* note 101; *Wintershall* at *supra* note 143; *Daimler* (Award) at *supra* note 151; and *Canfor Corporation & Terminal Forest Products*



thus simply held that the legalistic considerations prevail over the teleological ones. Again, it is the ultimate goal of the argument that reveals the approach taken by the arbitrators, not the narrative.

When discussing teleological approaches in the analysed practice, it is important to identify the object and purpose in question.<sup>204</sup> It has been recognised that investment tribunals indeed tend to rely on the objects and purposes of investment treaties, which often favours investors.<sup>205</sup> However, identification of different objects and purposes of a treaty might lead to different interpretations.<sup>206</sup> Arbitral practice is familiar with cases where observing the object and purpose of investment treaties led to pro-State approaches, usually by imposing stricter standards on the investors.<sup>207</sup> Other tribunals tried to find a middle ground, arguing that the protective purpose can be addressed both to States and investors.<sup>208</sup> Hence, it is questionable whether reliance on the object and purpose necessarily favours investors.

It is submitted that what matters most is which object and purpose is given actual effect in the reasoning. The mention of the “object and purpose” motivates analyses on different levels of abstraction, from taking concrete measures (such as to protect foreign investment), to improving the conditions for certain ultimate goals (such as economic development).<sup>209</sup> The tribunals that based their decision on the

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Ltd. v. United States of America, UNCITRAL arbitration, Decision on Preliminary Question, ¶¶ 179, 233 (June 6, 2006).

204. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, 31, at 44 (May 28) (dissenting opinion by Guerrero J., McNair J., Read J., Hsu Mo J.) (“What is the ‘object and purpose’ . . . ? . . . That is the heart of the matter.”); see generally Jan Klabbbers, *Some Problems Regarding the Object and Purpose of Treaties*, 8 FINNISH Y.B. INT’L L. 138 (1997).

205. Christoph H. Schreuer, *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 3 T.D.M. 4-7 (2006); Sanja Djajić, *Searching for purpose: Critical assessment of teleological interpretation of treaties in investment arbitration*, 2016 INT’L REV. L. 4 (2016).

206. A single treaty can have different objects and purposes depending on the particular context, and the question at hand. See Klabbbers, *supra* note 204, at 148-50.

207. See *Malaysian Historical Salvors, Sdn. Bhd v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, ¶¶ 66-68 (May 17, 2007) [hereinafter *Malaysian Historical Salvors (Jurisdiction)*] (invoking a teleological approach to conclude that an “investment” should contribute to the economic development of the host State); see also *Malaysian Historical Salvors, Sdn. Bhd v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Annulment Proceedings, Dissenting Opinion of Judge Mohamed Shahabuddeen, ¶ 2 (Feb. 19, 2009) (disagreeing with the Annulment Committee majority, and arguing that a contribution to the economic development is condition of an “investment”); *Mr. Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, ¶ 28 (Nov. 1, 2006); *Alps Finance and Trade AG v. The Slovak Republic*, UNCITRAL *ad hoc* arbitration, Award, ¶ 226 (March 5, 2011). Cf. *CSOB*, *supra* note 11, at ¶ 64 (arguing in favour of liberal interpretation, in certain cases, of the term “investment” relying on the notion of economic development).

208. *Amco Asia Corporation et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, ¶ 23 (Sept. 25, 1983) (“to protect investments is to protect the general interest of development and of developing countries”); see also *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL *ad hoc* arbitration, Partial Award, ¶ 300 (March 17, 2006).

209. See *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments*, pmbl., May 21, 1981, 12 U.N.T.S. 27558 (mentioning, for example, “favourable conditions for greater investment by nationals and companies of one State in the territory of the other State,” “protection under international agreement of such investments,” and increasing “prosperity in both States”); see also *Argentina-Germany BIT*, *supra* note 139, pmbl. (referring to, in the following order, “economic cooperation between both States,” “favourable conditions for investments by nationals and companies of either State in the territory of the other State,” “protection of such investment” and the increase of “the prosperity of both nations”); *Reciprocal Investment Promotion and Protection Agreement Between the Government of the*

teleological ideal, as discussed above, clearly gave direct effect to the idea of protection of foreign investment.<sup>210</sup> Indeed, that is possible because the identified object and purpose appears quite concrete and determined: to protect a defined class of persons.<sup>211</sup> On the other hand, more abstract object and purpose cannot be given direct effect: it appears as a motivation for investigating further arguments, and it requires assistance from certain intermediary steps towards the final decision.<sup>212</sup> What is of crucial importance for this analysis are the cases where teleological concerns served as direct bases for the decisive arguments in the resolution of jurisdictional issues. As seen above, the notion of investor protection indeed has such a quality to be directly applied as a decisive argument.

Once investment protection is identified as a notion that can actually be given effect, the question is to what entity it attaches: the relevant treaty or investment law as such. To put it more concretely, do arbitrators look at the object and purpose of the BIT before them, or of the investment law system as a whole? The VCLT refers to the object and purpose of the treaty,<sup>213</sup> which is of course understandable since it is the treaty that is being interpreted and applied as the law.<sup>214</sup> Hence, formally, arbitrators always must refer to the object and purpose of the relevant treaty. However, references to the notion of investment protection point only to an unde-

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Kingdom of Morocco and the Government of the Federal Republic of Nigeria, pmbL., Dec. 3, 2016 (referring to the sustainable development of the States parties, the right to regulate and “an overall balance” of the States’ and investors’ rights and obligations). Further on the diversity of objectives that can be found in investment treaties see Wälde, *supra* note 77, at 759-60; see also Omar E. Garcia-Bolivar, *The Teleology of International Investment Law. The Role of Purpose in the Interpretation of International Investment Agreements*, 6 J. WORLD INV. & TRADE 751 (2005). It is up to the acting tribunal to determine which elements it will use in the identification of the object and purpose of a treaty—more abstract ones, or more concrete ones.

210. See, most importantly, *Tza Yap Shum* at *supra* note 116 and accompanying text; *Renta 4* at *supra* notes 122-123 and accompanying text.

211. Identifying the protection of investments and/or investors as the object and purpose of a BIT seems also quite a direct conclusion, given the importance of the title in the identification process. See Klabbbers, *supra* note 204, at 158. Investment tribunals have been criticised that they have often failed to acknowledge different objects and purposes and to find an appropriate balance which would favour neither investors nor the State. See TARCISIO GAZZINI, *INTERPRETATION OF INTERNATIONAL INVESTMENT TREATIES* 163-66 (2016).

212. Thus, in *Malaysian Historical Salvors* it was not the issue of contribution to the economic development that was decisive in denying the access to arbitration, but rather the issue of quantification. As noted by the Tribunal itself, theoretically any transaction could contribute to the host State’s economic development. However, it further found that in order to qualify as an “investment,” a transaction must make a *significant* contribution to the host State’s economic development, and it did so by looking primarily into the previous case law. See *Malaysian Historical Salvors* (Jurisdiction), *supra* note 207, at ¶¶ 113-24. On the other hand, the same concept of the contribution to the economic development of the host State can equally be used as a pro-investor tool in the establishment of an “investment,” and this demonstrates the lack of a concrete meaning of such concept. See, for example, *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 42-43 (July 11, 1997).

213. See *supra* note 11.

214. Treaty text should be central in its interpretation using any of the tools of the VCLT, including the object and purpose. See Mahnouch H. Arsanjani & W. Michael Reisman, *Interpreting Treaties for the Benefit of Third Parties: The “Salvors’ Doctrine” and the Use of Legislative History in Investment Treaties*, 104 AM. J. INT’L L. 597, 599-600 (2010). For an analysis of the object and purpose of a treaty as the common intentions of the parties, see Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), Judgment, 1989 I.C.J. Rep. 15, 94, at 97-100 (July 20) (dissenting opinion by Schwebel, J.).

finer idea, which triggers arbitrators' personal understandings of what that protection might be.<sup>215</sup> The above-analysed practice shows that when examining the treaties' object and purpose to protect foreign investment, the tribunals were always referring to their own understanding of what are investor-friendly conditions and institutions, and what requirements would not meet such a purpose.<sup>216</sup> In that way, the notion of investment protection is actually used as a phenomenon independent of, and not peculiar to, any particular treaty; it is used as the "object and purpose" of the system of international investment law as such.<sup>217</sup>

The issue that arises is how the "object and purpose" of international investment law, as opposed to that of the relevant treaty, operates in every day practice. It has been argued that international law does not allow the so-called "objective teleological" interpretation of treaties.<sup>218</sup> According to this view, it is always the object and purpose the States parties to a BIT had in mind that is observed, and this would ultimately render any distinction between legalistic and teleological notions (as discussed in this article) moot.<sup>219</sup> However, the argument advanced here is that the use of the protective purpose of international investment law amounts exactly to an "objective teleological" interpretation of treaties. As seen above, arbitrators relying on treaties' object and purpose view the notion of investment protection as phenomenon independent of any particular treaty, and it might be said that in such cases the reliance on the object and purpose of the relevant BIT is used only as a gateway towards finding such an objective meaning.<sup>220</sup> Finally, such a quest for an

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215. It has been noted that "[i]n a clear majority of [the analysed] decisions, the tribunals did not refer to any source for their statements concerning the object and purpose." Fauchald, *supra* note 13, at 322. See also Wälde, *supra* note 77, at 760-65 (arguing that "it is in most cases very difficult or not possible to predict the future, that is, how a particular treaty and even more so a particular interpretation of a specific treaty issue, will contribute in a highly complex environment to the achievement of the objective"; Wälde further argues that arbitrators often rely on "intuition and sentiment" in resolving such dilemmas, and that "[t]ribunals can in many cases speculate, but not professionally predict how a general objective (eg economic or sustainable development) can be achieved by application of a treaty"). This phenomenon, however, is not limited to the field of international investment law. See Lauterpacht, *supra* note 10, at 69-70, 83.

216. See, for example, *Tza Yap Shum* at *supra* note 116; *Renta 4* at *supra* note 122 and accompanying text; *Abaclat* at *supra* notes 177-179 and accompanying text. The Tribunal in *Renta 4* observed that the protective purpose of an investment treaty does not necessarily mean favouring investors; see *supra* note 121. However, arguably, it is precisely because of the indeterminacy of the object and purpose, and the necessity for arbitrators to speculate how the objectives can be achieved, that protective purposes indeed lead to favouring investors.

217. See also *Occidental* (Court of Appeal), *supra* note 105, at ¶ 28 (discussing the object and purpose of "a BIT"); and SCHILL, *supra* note 24, at 314-19.

218. ULF LINDERFALK, ON THE INTERPRETATION OF TREATIES: THE MODERN INTERNATIONAL LAW AS EXPRESSED IN THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 205 (2007) ("According to this terminology, interpretation is subjective teleological when a law is interpreted based on the objects and purposes presumed conferred on the law by the original 'lawmaker'. If, on the other hand, the law is dissociated from its authors, and instead the applier ventures to interpret it based on the objects and purposes presumed assigned to the law by the legal community – given the laws of the nation at large – or by people in general, then interpretation is objective teleological.").

219. *Id.* Linderfalk argues that "'the object and purpose' of a treaty can hardly be anything other than the object and purpose, which the parties to the treaty intended it to have – or rather, more specifically, mutually intended it to have."

220. Indeed, the Tribunal in *Tza Yap Shum* relied on the object and purpose of the BIT in its quest for an "objective meaning" of the dispute resolution clause. See *supra* note 115 and accompanying text. This goes hand in hand with the observation that tribunals usually aim at finding an objective meaning of the treaty before them, as opposed to the subjective one (*i.e.* as intended by the States parties), while still often invoking the treaty's object and purpose. See text to *supra* notes 79-81.

objective meaning of the treaty complies with the teleological ideal of investment law and arbitration as identified above, with its distinct protective purpose, which suggests viewing investment treaties differently from traditional treaty-contracts, and perhaps even as securing global public good.<sup>221</sup>

Therefore, regardless of the actual language used by arbitrators, the two approaches can be identified by looking into the ultimate objective. While the legalistic approaches stick to applying not more than what was consented to by States, the teleological approaches pursue the protective purpose of international investment law as a phenomenon not peculiar to any particular treaty. Thereafter, the two approaches can be used in different manners, which is discussed in the following Section.

### B. *Modus Operandi*

Having identified legalistic and teleological approaches in the formation of decisive arguments, now it can be seen how they actually work. Two particular modes are identified here: using one of them to rebut the opposite, and using one of the two ideals as the basis for further adjustment of the interpretive tools.

That too much emphasis on the object and purpose of a treaty can lead to departing from the intentions of States parties, has been recognised as a warning in arbitral practice.<sup>222</sup> An empirical study shows that legalistic concerns, such as the intentions of States parties, have been often used to rebut interpretations which would lead to different (seemingly unintended) outcomes.<sup>223</sup> When observing this issue from a broader perspective, concentrating on the legalistic and teleological ideals as suggested in this article, it can be seen that the two points of view are often used to rebut the opposite one, bearing in mind the consequences stemming from each of them.

First, within the same case, the majority and the dissenting arbitrator can use one of the two ideals to rebut the opposing view. For example, the dissenting arbitrator in the *Abaclat* case used a legalistic approach to rebut the arguments advanced by the majority, which were built on the teleological ideal.<sup>224</sup> On the other hand, the dissenting arbitrators in the *Berschader* and *Daimler* cases used teleological approaches to rebut the legalistic point of view taken by the two majorities. The former expressly argued that the object and purpose of protection of foreign investment changed the interpretation of the treaty,<sup>225</sup> while the latter advanced an argument effectively enhancing the protection of the investor.<sup>226</sup> These conflicting approaches were used to advocate for opposing interpretive outcomes, *i.e.* to favour

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221. See *supra* Part II, Section A, Subsection ii. Schill's argument that the jurisprudence of investment tribunals forms a public good suggests that tribunals observe a "treaty-overreaching" framework, principles and precedents. See Schill, *supra* note 54, at 19-22.

222. *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 193 (Feb. 8, 2005) [hereinafter *Plama*]; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, ¶ 340 (Aug. 16, 2007).

223. See Fauchald, *supra* note 13, at 317 (noting that "[t]he intention of the parties was most often used as a specific argument against a proposed interpretation, for example by stating that 'it cannot have been the intention of the parties'").

224. See text to *supra* notes 180-182.

225. See *supra* note 89.

226. See *supra* notes 152-153, 191 and accompanying text.

the investor using the teleological approach, or to favour the State using the legalistic one.

Second, tribunals can use one of the two ideals as the basis of their arguments rebutting the positions of the parties, or the positions taken in previous cases. For example, the Tribunal in the *RosInvest* case used a legalistic point of view in order to reject the teleological argument presented by the Claimant.<sup>227</sup> On the other hand, some tribunals used teleological approaches to rebut legalistic arguments both presented by the responding State,<sup>228</sup> or advanced in previous case law.<sup>229</sup> Such rebuttals become even more interesting when observed at domestic level in the context of judicial control of awards, where judges of lower and higher courts can confront their opinions as to which one of the two ideals of investment treaty arbitration should be given primacy.<sup>230</sup> Again, the conflicting approaches were used to reach opposite interpretive outcomes.

Besides this explicit use of the two ideals, there is another, discrete, but more important mode of their operation. By opting for a legalistic or a teleological approach, arbitrators are not simply choosing between emphasising the parties' consent or the object and purpose to enhance investor protection. It also allows them to take a point of view outside the rules of treaty interpretation, and adjust their use accordingly. Indeed, this can be observed in the above-analysed practice. For example, the Tribunal in the *Wintershall* case first took a legalistic approach, and then engaged in treaty interpretation concentrating on the ordinary meaning and context of the relevant clause.<sup>231</sup> It is obvious that tribunals following teleological approaches would reach for the treaty's "object and purpose," as a tool mentioned in the VCLT. But that does not exclude taking into account other factors. The Tribunal in *Renta 4* took a teleological approach when interpreting the meaning of the terms "relating to" and "due."<sup>232</sup> The same was done by the *Tza Yap Shum* Tribunal in regard to the word "involving."<sup>233</sup> Therefore, opting for one of the two approaches allows arbitrators to manage and adjust the use of interpretive tools as they deem fit.

The interpretive tools used in such an exercise are not necessarily only those provided in the VCLT. As observed, investment tribunals indeed use many "non-Vienna rules" of treaty interpretation,<sup>234</sup> some of them clearly in favour of one or

227. See text to *supra* note 94. See also *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, ¶¶ 115-9 (Nov. 29, 2004); *Plama*, *supra* note 222, at ¶¶ 193, 216-24 (both dismissing the *Maffezini* reasoning regarding the application of MFN clauses to dispute resolution clauses on legalistic grounds).

228. See *Bayindir* at *supra* notes 164-166 and accompanying text; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 54-6 (Jan. 25, 2000) [hereinafter *Maffezini*] (using teleological approach to reject a strict division between substantive and procedural treaty rights advanced by the Respondent, and to allow the application of an MFN clause to the dispute resolution clause).

229. See *SGS v. Philippines* at *supra* notes 107-109 and accompanying text; *Renta 4* at *supra* note 125 and accompanying text.

230. See *supra* note 126. See also *Government of the Lao People's Democratic Republic v. Sanum Investments Ltd* [2015] SGHC 15, [124] (Sing.) (dismissing the Tribunal's jurisdiction over the legality of expropriation on legalistic grounds); *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic* [2016] SGCA 57, [150] (Sing.) (affirming the Tribunal's jurisdiction over the legality of expropriation on teleological grounds).

231. See *supra* notes 141-144 and accompanying text.

232. See *supra* notes 118-125 and accompanying text.

233. See *supra* notes 113-116.

234. See generally Wälde, *supra* note 77, and particularly the quote in the same note.

the other disputing party.<sup>235</sup> Taking one of the two approaches allows arbitrators to introduce such rules. For example, the principle of effectiveness normally favours investors as claimants.<sup>236</sup> But what is more important is that tribunals link the principle of effectiveness directly to the object and purpose of investment treaties.<sup>237</sup> And the same link is made between the principle of *in dubio mitius* and State sovereignty.<sup>238</sup> Thus, by opting for a legalistic or teleological approach, arbitrators get an opportunity to introduce, in addition to the “Vienna rules,” a particular “non-Vienna rule” that stems from, but also protects, either the legalistic or teleological ideal of investment treaty arbitration.

Finally, taking one or the other approach also allows arbitrators to create the standards against which the interpretation is conducted. Some tribunals expressed their own view on the purpose of dispute settlement clauses within the protective purpose of investment law, and took the access to arbitration as an imperative in treaty interpretation.<sup>239</sup> Taking either of the two approaches can as well result in shifting focus to more abstract concepts from the actual law. This is particularly visible in the context of conditions precedent. While general international law indeed provides certain rules with some degree of tolerance towards the satisfaction of conditions of consent,<sup>240</sup> some tribunals still found it more fruitful to rely on concepts,<sup>241</sup> and to ignore such legal rules in reaching their decision.

What is clear from these uses of the two ideals of investment treaty arbitration, is that decisive arguments (be it for the rebuttal of the opposite approach, or adjustment of the use of the interpretive tools) essentially send the message that “the truth is out there.” While legalistic decisive arguments find their substance in the foundations of general international law and its basic concepts, teleological decisive arguments find their merits in the protective purpose of international investment law. In both cases, they are formed outside the relevant treaty. Such a formation of decisive arguments ultimately amounts to never-ending excuses, as arbitrators justify their pro-investor or pro-State interpretations of investment treaties by relying on the phenomena independent of the treaty before them.

235. Thus, it is said that the principle of effectiveness in treaty interpretation favours investors, while the maxim *in dubio mitius* usually favours States. *See id.* at 733-40.

236. *See* Lauterpacht, *supra* note 10, at 65-72 (noting the use of the principle of effectiveness in the establishment of somewhat broader, or implied, jurisdiction of international courts).

237. *See Noble Ventures*, *supra* note 71, at ¶ 52; *see also SGS v. Philippines*, *supra* note 102, at ¶ 116; *Eureko B.V. v. Republic of Poland*, *ad hoc* arbitration, Partial Award, ¶ 248 (Aug. 19, 2005). *See also* Lauterpacht, *supra* note 10, at 68-70; GAZZINI, *supra* note 211, at 169-75.

238. *See* again, paradoxically, *Noble Ventures*, *supra* note 71, at ¶ 55; *see also SGS v. Pakistan*, *supra* note 95, at ¶¶ 166-71. *See further* Wälde, *supra* note 77, at 733 ff.; Lauterpacht, *supra* note 10, at 56-61.

239. *See supra* discussions concerning the *Bayindir* and *Abaclat* cases.

240. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), Preliminary Objections, 2008 I.C.J. Rep. 412, ¶ 81 (Nov. 18) (regarding the so-called *Mavrommatis* doctrine: “. . . the Court, like its predecessor, has also shown realism and flexibility in certain situations in which the conditions governing the Court’s jurisdiction were not fully satisfied when proceedings were initiated but were subsequently satisfied, before the Court ruled on its jurisdiction.”); *Ambiente Ufficio S.p.A. et al. v. The Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶¶ 597-607 (on the futility exception and local litigation requirements).

241. *See Bayindir* at *supra* notes 165-166 and accompanying text (invoking the parties’/investor’s interests); *Abaclat* (Jurisdiction) at *supra* notes 175-177 and accompanying text (invoking fairness and efficiency concerns in investor protection when bypassing the local litigation requirement). *See also* Giulia D’Agnone, *Recourse to the “Futility Exception” within the ICSID System: Reflections on Recent Developments of the Local Remedies Rule*, 12 L. & P. INT’L COURTS & TRIBUNALS 343, 352 (2013) (discussing the *Abaclat* decision’s avoidance of the local litigation requirement by invoking neither the MFN clause nor the futility exception).

## C. Reach—The “RosInvest Problem”

But what happens when arbitrators appear to employ both legalistic and teleological approaches in resolution of different jurisdictional issues? The problem can be observed in the *RosInvest* case.<sup>242</sup> While the Tribunal in that case appeared quite legalistic-oriented when ruling on the scope of consent to arbitrate,<sup>243</sup> it later allowed the application of the MFN clause to the dispute resolution clause, broadening its jurisdiction and allowing the claim to proceed to the merits, and it did so by relying on teleological concerns.<sup>244</sup> In *Renta 4* the Tribunal employed a teleological approach to decide on the scope of consent,<sup>245</sup> but it did not allow the same concerns to prevail on the issue of the application of the MFN clause to the dispute resolution provision of the applicable BIT.<sup>246</sup> Indeed, how is it possible that the same tribunal is able to take such different points of view, variably favouring one or the other party to the dispute, not only in terms of the outcomes, but foremost in the interpretive exercises which it builds from that point?

At the outset, it is difficult to expect that decisive arguments are built and given effect by the same line of reasoning on a variety of different jurisdictional issues. It is fairly odd to encounter examples of “total legalism” or “total teleology” among arbitral awards.<sup>247</sup> Such an expectation would exceed the examination of how decisive arguments are being grounded, and would rather pertain to the issue of arbitrators’ biases.<sup>248</sup> But most importantly, a suggestion that entire awards appear legalistic or teleological would be difficult to verify. Respondents tend to raise numbers of jurisdictional objections,<sup>249</sup> touching upon many different issues, often peculiar to the particular treaty and/or provision.<sup>250</sup> Facing a variety of jurisdictional

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242. *RosInvest*, *supra* note 91.

243. See text to *supra* notes 93-94.

244. See *supra* note 91.

245. See text to *supra* notes 122-125.

246. However, teleology was present in the Tribunal’s reasoning. See *Renta 4*, *supra* note 87, at ¶¶ 90, 97, 100 (for teleological considerations), 105-19 (for prevailing legalistic considerations). Again, the dissenting opinion in this respect shows a clash between prevailing legalistic and teleological concerns. See *Renta 4 S.V.S.A. et al. v. The Russian Federation*, SCC Case No. 24/2007, Separate Opinion of Charles N. Brower, ¶¶ 22-23 (Mar. 20, 2009). See also *Tza Yap Shum* (Jurisdiction), *supra* note 111, at ¶¶ 199-216.

247. Nevertheless, such examples arguably do exist. See *Berschader* (Award), *supra* note 83; *ICS Inspection*, *supra* note 155 (arguably examples of “total legalism”); *Ansung Housing Co., Ltd. v. People’s Republic of China*, ICSID Case No. ARB/14/25, Award (March 9, 2017) (arguably an example of “total legalism” in dismissing claims for manifest lack of legal merit on jurisdictional grounds); *Abaclat* (Jurisdiction), *supra* note 172 (arguably an example of “total teleology”).

248. Arbitrators’ biases in favour of foreign investors are often alleged in relation to prospective pro-investor outcomes. See SORNARAJAH, *supra* note 6, at 136-47 (on arbitral adventurism in extending jurisdiction); GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 167-75 (2007) (on the lack of arbitral independence and possible extensions of jurisdiction); Van Harten, *supra* note 2, at 445-46 (on the lack of independence and encouragement of claims). Cf. William W. Park, *Arbitrator Integrity*, in THE BACKLASH, *supra* note 1, at 213-16 (rebutting systematic bias in investment arbitration).

249. See Andrea Carlevaris, *Preliminary Matters: Objections, Bi-furcation, Request for Provisional Measures*, in LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER’S GUIDE 173, 180-81 (Chiara Giorgetti ed., 2014).

250. For example, definitions of “investor” and “investment,” scope of consent to arbitrate, temporal application of the treaty at hand, conditions precedent etc.—all defined by individual investment treaties.

issues, arbitrators should be more realistically expected to approach them individually. Legalistic and teleological approaches should be equally expected to be expressed in the resolution of individualised jurisdictional issues.

The expression of the two approaches in the resolution of particular issues, however, still does not answer the question raised above. Should an arbitrator refer to “the truth out there,”<sup>251</sup> it is reasonable to assume the application of that “truth” throughout the entire arbitral reasoning. However, it is suggested, that is not the case. What matters more are the needs and opportunities. Jurisdictional questions differ. Not all of them decide cases, but some indeed do so; some appear more important than the others, both in the eyes of the parties and the arbitrators.<sup>252</sup> Some have been subject to generalised scholarly analyses.<sup>253</sup> Most of conceptually similar issues appear unique in practice due to other important factors, such as textual disparities among treaty provisions,<sup>254</sup> or the arguments advanced by the parties.<sup>255</sup> In such a chaotic environment the question of the expression of teleological and legalistic approaches does not appear as “either—or,” but as “more or less.” In other words, the issue at hand will dictate to what extent one or the other approach will be expressed. There might be an impediment for the expression of one of the two approaches to the extent that it becomes dominant one and serves as the basis of the decisive argument.<sup>256</sup> In such occasions, no matter the willingness of the arbitrators to pursue one or the other ideal, the lack of the opportunity to do so will limit their effect.

Once the need and opportunity are both present, the two ideals become self-expressive. Assuming that the *RosInvest* Tribunal was necessarily looking for a way to the merits, instead of insisting on difficult teleological constructions when ruling on the scope of consent, another question in the case provided a more fertile ground for doing so.<sup>257</sup> In *Renta 4*, the Tribunal faced a textual impediment for teleology

251. See *supra* Part IV, Section B.

252. See *Renta 4*, *supra* note 87, at ¶ 74 (noting in regard to one of the Respondent’s arguments concerning the MFN issue: “This argument was not pursued with great insistence. Nor should it have been.”).

253. For example, scholars have relied on the protective purpose of investment treaties to support the MFN-dispute resolution conjunction. See SCHILL, *supra* note 24, at 180.

254. For example, differently defined “investments,” scopes of consent, MFN clauses etc. Cf. *Berschader* (Award), *supra* note 83, at ¶ 47 (Article 10, ¶ 1, Belgium-Luxembourg-USSR BIT, limiting the scope of consent to disputes “concerning the amount or mode of compensation to be paid under Article 5 of the present Treaty”); with *SGS v. Philippines*, *supra* note 102, at ¶ 34 (Article VIII, ¶ 1, Switzerland-Philippines BIT, consenting to the settlement of disputes “with respect to investments between a Contracting Party and an investor of the other Contracting Party”). Cf. *Maffezini*, *supra* note 228, at ¶ 38 (Article IV, ¶ 2, Argentina-Spain BIT, granting MFN treatment “[i]n all matters subject to this Agreement”); with *RosInvest*, *supra* note 91, at ¶ 126 (Article 3, ¶ 2, UK-USSR BIT, granting MFN treatment to investors “as regards their management, maintenance, use, enjoyment or disposal of their investments”); and *Renta 4*, *supra* note 87, at ¶ 68 (Article 5, ¶ 2, Spain-USSR BIT, granting MFN treatment limited to fair and equitable treatment).

255. Even depending on the quality of pleadings. See Jan Paulsson, *Awards—and Awards*, in INVESTMENT TREATY LAW. CURRENT ISSUES III 97, 102-3 (Andrea K. Bjorklund et al. eds., 2009). See also Ömer Dede and Serdar Elhüseyni v. Romania, ICSID Case No. ARB/10/22, Award, ¶¶ 255-61 (Sept. 5, 2013) (elaborating on the Claimants’ failure to make alternative arguments on a jurisdictional issue). Cf. *CDC Group PLC v. The Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Republic of Seychelles, ¶ 57 (June 29, 2005) (affirming tribunals’ liberty to identify legal questions before themselves).

256. See *Renta 4*, *supra* note 87, at ¶ 105 (facing an MFN clause limited to the fair and equitable treatment standard, thus not offering much manoeuvring space).

257. See *supra* note 91.



to prevail when dealing with the MFN-dispute resolution conjunction, but it already gave dominance to that ideal when deciding on the scope of consent, thus extending its jurisdiction (to a certain extent).<sup>258</sup> Insisting on “total teleology,” leading to radical protective outcomes, can be seen as simply unreasonable, with prospectively self-destructive consequences.<sup>259</sup> The self-expression of the two ideals through the interpretive exercises when the need and the opportunity match shows the unneutrality of investment treaty arbitration in its full light: while an emphasis on what States parties intended at the expense of what should be achieved suffices to end up with one view on a jurisdictional issue, an emphasis on what should be achieved at the expense of what States parties intended leads to taking the other. The fact that one needs to “shift paradigms,” as international lawyers like to put it, in building decisive arguments towards a different interpretive outcome, is another proof of such unneutrality.

Therefore, the two approaches discussed here should not be understood as generalised burdens of arbitrators. Their reach is limited to the resolution of concrete and individualised jurisdictional issues. All the more so because jurisdictional issues themselves dictate the needs and opportunities for their expression.

## V. CONCLUSION

The above-analysed theoretical foundations of investment treaty arbitration, as well as the arbitral practice, show that the legalistic and theological ideals, as defined in this article, do have an important role to play in the formation of decisive arguments in arbitral reasoning. The two ideals are employed in the formation of decisive arguments when analysing how an investment treaty should be applied. They do not allow decisive arguments to be built in any other way than appearing pro-investor or pro-State in interpretive outcomes, while referring to “the truth out there,” *i.e.* to the phenomena outside the treaty, in the very foundations of investment treaty arbitration. This amounts to never-ending excuses, because those foundations are, and always will be, credited for arriving to such outcomes. The imperative of “balance,” which is often pursued in both practice and scholarship, is hence hardly achievable. The failures of finding a “balance,” and constant surrenders to the two ideals of investment treaty arbitration have nothing to do with biases. They stem from the foundations of that system, and affect equally all decision-making in its context, be it arbitral or judicial.<sup>260</sup>

It appears that investment treaty arbitration offers equal opportunities to favour both States and foreign investors. But the problem does not arise only when it is realised that there are more awards or arbitrators appearing biased in favour of one or the other side. The problem is that investment treaty arbitration offers such op-

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258. See *supra* notes 122-125, 246, 256 and accompanying text; see also *Tza Yap Shum* (Jurisdiction), *supra* note 111, at ¶¶ 199-216; and *Sanum Investments Limited v. The Government of the Lao People's Democratic Republic*, PCA Case No. 2013-13, Award on Jurisdiction, ¶¶ 322-58 (Dec. 13, 2013). The *Sanum* case is another example of domestic courts' clashes on the legalistic/teleological basis. See *supra* note 230.

259. See *supra* Part IV, Section A; particularly see text to *supra* notes 198-199.

260. Domestic judiciaries have not been immune to opting for one or the other point of view when dealing with international investment arbitrations. See, regarding French, Singaporean, Swedish, UK, and US courts, *supra* notes 105, 126, 127, 177, 230.

portunities in the first place, because they breach the illusion of the harmony between the legalistic and the teleological. Nevertheless, these opportunities are not anomalies that could or should be remedied. They are realities that should be lived with, because they stem from the foundations of the international legal order, and are inherent to the system of international treaty arbitration. Instead of endless demands for perfection, perhaps more efforts should be directed towards finding a way to live with such realities.